(26,336)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 869.

SEABOARD AIR LINE RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY, SOUTHERN RAILWAY COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE RICHMOND CHAMBER OF COMMERCE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1918.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, the Interstate Commerce Commission and the Richmond Chamber of Commerce, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at Washington on the 5th day of March, next, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia, in your favor passed in a cause in said Court wherein Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company are Petitioners, and you are Defendants, to show cause, if any there be, why the decree rendered against the said Seaboard Air Line Railway Company and others in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, this 5th day of February, in the year of our Lord one thou and nine hundred and eighteen.

EDMUND WADDILL, JR.,
United States District Judge.

Service of a copy of the within citation is hereby acknowledged this sixth day of February, 1918.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For the United States.
CHAS. W. NEEDHAM,
For the Interstate Commerce Commission.
WM. A. GLASGOW, JR.,
For the Richmond Chamber of Commerce.

1 TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the United States Court Room, in the Post Office Building, in the City of Richmond, Virginia, on the first Monday in the month of October, being the first day of the same month, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorables Jeter C. Pritchard and Charles A. Woods, United States Circuit Judges for the Fourth Circuit, and Edmund Waddill, Jr., United States District Judge for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In Equity. No. 37.

SEABOARD AIR LINE RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY, SOUTHERN RAILWAY COMPANY, and THE ATLANTIC COAST LINE RAILROAD COMPANY, Petitioners,

versus

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and THE RICHMOND CHAMBER OF COMMERCE, Defendants.

Petition.

Filed November 6th, 1917.

To the Honorable Judges of the District Court of the United States for the Eastern District of Virginia:

Seaboard Air Line Railway Company is a corporation organized under the laws of the state of Virginia, and the Southern Railway Company, and the Atlantic Coast Line Railroad Company present this their petition, and thereupon say as follows:

2 I.

Seaboard Air Line Railway Company is a corporation organized in 1915 under the laws of the state of Virginia and other states, having its residence and principal place of business in the city of Petersburg, in said state of Virginia, and is the successor of the former corporation known as Seaboard Air Line Railway. Both of said companies will be referred to hereinafter as the Seaboard.

Southern Railway Company, called hereinafter the Southern, is a corporation organized under the laws of the state of Virginia, having its residence and principal place of business in the city of Richmond in said state.

The Atlantic Coast Line Railroad Company, called hereinafter the Coast Line, is a corporation organized under the laws of the state of Virginia, having its residence in the city of Petersburg, and its principal place of business in the city of Richmond, both in said state.

Each of the petitioners separately owns and operates many lines of railroad, aggregating more than 15,000 miles in length, all of which, with the exception of certain lines of the Southern, are located in that part of the United States which lies south of the Ohio and Potomac rivers and east of the Mississippi River.

3 Among said lines, each of the petitioners owns and operates and it, or its predecessors in title, has for many years owned and operated, a line of railroad which penetrates and serves the city of Richmond, Va., together with numerous tracks, spurs, and sidings in and about said city. Upon the separate tracks, spurs and sidings of each of the petitioners in and about Richmond are located numerous plants and warehouses of commercial and industrial enterprises.

In addition to the lines of the petitioners the principal lines of railroad which penetrate and serve the city of Richmond are the separate lines of the Chesapeake & Ohio Railway Company, hereinafter called the C. & O., and the Richmond, Fredericksburg & Potomac Railroad Company, hereinafter called the R., F. & P., and upon the separate spurs, tracks, and sidings of the said C. & O. and R., F. & P., at Richmond, are located numerous plants and warehouses of commercial and industrial enterprises. The location in, and in the outskirts of, Richmond of the principal tracks of each of the aforesaid companies, including each of the petitioners, and of many of the industries adjacent thereto, is as shown on the map annexed hereto and made a part hereof, marked Exhibit A.

At various places in, or in the outskirts of, Richmond are points of physical connection and interchange between the tracks of the several railroad companies at which loaded cars of freight

4 are transferred from the tracks of one company to the tracks of another, either directly, or if there is no immediate point of connection, through the agency of an intermediate line of a third company. The point of connection and interchange between the Seaboard and the Southern is in South Richmond (shown as Manchester on the above-mentioned map) on the south side of the James River and is indicated on said map by the letter "E." The point of connection between the Seaboard and the C. & O. is on the north side of the river near the center of the city, and is indicated on the map by the letter "G." The point of connection between the Seaboard and the R., F. & P. is on the extreme northern edge of the city, and is indicated on the map by the letter "I."

The Seaboard has no direct connection with the tracks of the Coast Line and interchanges between said carriers are made either

over the intermediate track of the R., F. & P. at point "I," in connection with the Belt Line extending from the tracks of the R., F. & P., on the northern edge of the city, around the western and southern edge and across the James River to the connection with the tracks of the Coast Line on the south side of the city at the place marked "Clopton" on the map, or over the intermediate track of the Southern at point "E" in South Richmond. The said Belt Line is 7.8 miles in length and is the joint property of the R., F. & P. and the Coast Line.

The point of connection between the Southern and the Coast Line is on the south side of the river at the point marked "D" on the map. The point of connection and interchange between the Southern and C. & O. is on the north side of the river and in the eastern part of the city, at the point marked "F" on the map. The Southern has no direct connection with the R., F. & P., and interchanges between the two roads are made through the medium of the Coast Line or some other carrier.

The Coast Line and R., F. & P. interchange carload traffic either at the point marked "A. C. L. 9th St. Yard," on the north side of the river and near the center of the city, or through the medium of the Belt Line (the joint property of the two roads) at Clopton or at "Acca," shown on the map and located on the northern edge of the city. The point of connection between the Coast Line and the C. & O. is indicated by the letter "H."

Attached hereto and made a part hereof is a table marked Exhibit B, showing the distances over the petitioners' several tracks between their various assembling yards, as shown on said map, and their respective points of connection and interchange with each other and with the C. & O. and R., F. & P., as described above.

II.

All of the petitioners are common carriers by rail, and as such they, or their predecessors in title, are, and have been for many years, engaged in the interstate transportation of carload traffic in large volume from or to Richmond, Va., to or from various points in other states. For said service of transportation to or from Richmond each of the petitioners maintains and publishes its rates and charges, including rates, rules and regulations governing switching at Richmond to and from industries. In like manner, for the transportation of traffic to or from Richmond the C. & O. and R., F. & P. separately maintain and publish their respective rates and charges.

For the purpose of identification the carrier performing the said service of transportation to or from Richmond will be referred to hereinafter as the "line-haul" carrier, and the rates and charges for said transportation will be referred to as the "line-haul" rates and charges.

III.

Petitioners state that they, and each of them, provide in their tariffs for interchanging, and whenever called upon to do so interchange, loaded cars of freight at Richmond with each other and with the C. & O. and R., F. & P. They further state that it is, and has been for many years, the rule and practice of all of the aforesaid rail carriers, including the C. & O. and R., F. & P., that whenever a loaded car of freight is transported by any one of the car-
7 riers in line-haul service from any point to Richmond, and is destined to an industry in or about said city which is not located upon the tracks of the carrier in performing the line-haul service, but is upon the tracks of some other carrier or carriers, within certain definite limits known as the "switching limits" of the city, the carrier performing the line-haul service will haul the loaded car with its own engines and crews to Richmond and to its point of connection in, or in the outskirts of, said city with the tracks of the carrier upon whose tracks the industry is located and will there deliver the car to said connecting carrier. The carrier last named will thereupon, with its own engine and crew, perform a further service of hauling the loaded car over its separate tracks from the said point of connection to the industry located upon its tracks. In like manner, on outbound carload traffic originating at an industry which is not located upon the tracks of the carrier performing the line-haul transportation from Richmond, but is upon the tracks of some other carrier and within the "switching limits" of the city, the carrier upon whose tracks the industry is located will haul the loaded car with its own engine and crew from the industry to the point of connection with the tracks of said line-haul carrier. The aforesaid service of transportation of an inbound or outbound loaded car between the industry and the tracks of the line-haul car-
rier is commonly known, and is referred to hereinafter, as
8 a "switching service." The carrier performing the switching service is known, and referred to hereinafter, as the "switching carrier" as distinguished from the line-haul carrier, and the switching carrier in all such cases is said to switch for the line-haul carrier.

Petitioners state that on either inbound or outbound carload traffic, if there is no point of physical connection and interchange at Richmond between the tracks of the line-haul carrier and the tracks of the carrier upon whose tracks the industry is located, an additional switching service is performed by a third and intermediate carrier, with its own engine and crew over its intermediate tracks, in order to complete the movement of the loaded car between the industry and the tracks of the line-haul carrier. They state that in this manner it frequently happens that the same loaded car of inbound or outbound traffic, in the course of the through movement to or from the industry, is switched at Richmond by two carriers neither of which is the carrier performing the line-haul service.

IV.

Petitioners state that for the said service of switching inbound or outbound carload traffic at Richmond, wherever the carrier performing the switching service is not the same carrier which performs the line-haul service to or from Richmond, each carrier performing the switching service charges its switching rate or charge, and that said switching charges are in varying amounts ranging from $1.50 per car to $5.00 per car, or even more, depending upon the character and extent of the switching service performed; and that, depending upon the location of the industry to or from which the loaded car is destined, the various switching movements at Richmond cover hauls of varying lengths and ranging from 100 yards, or even less, up to several miles. Petitioners state, however, that in the case of each one of the carriers, the same switching charge of said carriers covers in many instances switching hauls of substantially different lengths. For example, the Southern's charge for switching loaded cars of similar traffic, under the conditions described above, is the same between any points on said carrier's tracks both of which are located on the north side of the James River, although the switching hauls range in length from a few yards up to a mile or more, whereas, the Southern's charge is higher if the switching movement involves a haul by said carrier from a point on the north side of the river across the river to a point on the south side.

V.

Petitioners state that each of them duly publishes and files tariffs containing rates and charges for the interstate transportation of carload freight to and from Richmond. These tariffs, containing what are referred to herein for the purpose of description as line-haul rates, specifically refer to and make a part of the rates, charges and service shown therein the separately published switching tariffs effective at Richmond, of the line-haul carrier and of other carriers, and all carload shipments transported interstate by petitioners to and from Richmond are subject to the rules, charges and privileges shown in the line-haul tariff and in the switching tariff or tariffs applicable thereto taken together. These switching tariffs, taken together with the line-haul tariffs, determine and control the points of destination in and about Richmond and the points of origin in and about Richmond to and from which the rates, charges and privileges shown in the line-haul and switching tariffs apply, and determine, control and set out the through rates and charges from origin to destination.

Petitioners state that when a carload of freight is transported to Richmond by any one of them as the line-haul carrier, and is destined to an industry located upon the tracks or sidings of said line-haul carrier within the switching limits of the city, the line-haul carrier, upon arrival of the loaded car at Richmond, will haul said car with its own engine and crew over its own tracks to the point of loca-

tion of the industry without any added charge over and
11 above the charges accruing under the said line-haul rate. They state that this is the general practice of all of the rail carriers at Richmond.

Petitioners state that if a carload of freight is delivered to any one of them as the line-haul carrier, at any point on its lines, for transportation to Richmond and delivery to an industry within the switching limits of said city, which is not located upon the tracks of said line-haul carrier but is upon the tracks of some other carrier, the line-haul carrier, in consideration of and subject to the rates and charges and privileges shown in said tariffs, transports the loaded car of freight from the point of origin to its point of connection at Richmond with the tracks of the carrier upon whose track or siding the industry is located, or to its point of connection with the tracks of an intermediate carrier, and thereupon the said connecting carrier will switch the loaded car with its own engine and crew over its own tracks to the industry (the final detination), if located upon its tracks, and if not located upon its tracks, to the point of connection with the carrier upon whose tracks the industry is located, and said last-named carrier will thereupon switch the loaded car over its own tracks to the industry located thereon, which is the final destination.

VI.

It is, and has been for a number of years, the openly announced rule and practice of each of the petitioners, and set out in
12 duly published and filed tariffs as aforesaid, that whenever a loaded car of freight is transported by it, as the line-haul carrier, to or from Richmond, and is either destined to or originates at an industry within the switching limits of said city, which is not located upon the tracks of the line-haul carrier, but is upon the tracks of some other carrier, and said other carrier upon whose tracks the industry is located is a competitor, via its own separate line or route and under equal rates, with the line-haul carrier for the transportation of the traffic to or from Richmond, the said line-haul carrier will absorb and pay out of the through rate the duly published and established switching charge or charges of the connecting carrier, or carriers, for the movement of the loaded car in switching service between the industry and its own tracks. Wherever the switching charges are thus absorbed and paid by the line-haul carrier the shipper or receiver pays no extra charge for the transportation of the loaded car between the industry at Richmond and the point of origin or destination of the traffic over and above the charges accruing under the line-haul rate of the carrying line. The tariffs in which are published the line-haul rates, as aforesaid, duly refer to and make a part of the line-haul rates the rules, charges, privileges and regulations governing the additional switching service.

The rule and practice described in the preceding paragraph is illustrated by the following example:

13 Oxford, N. C., is a point which is reached by the separate lines of both the Seaboard and the Southern, and said carriers are competitors under equal rates for the transportation of carload traffic via their respective routes between Oxford, N. C., and Richmond. Industry "A" is assumed to be located within the switching limits of Richmond and upon the tracks alone of the Seaboard, and not reached by the tracks of the Southern, but included in the provisions of the switching tariff of the Southern providing for absorption of the switching charges of the Seaboard, as aforesaid. If a carload of freight is delivered to the Seaboard at Oxford for transportation and delivery to industry "A" at Richmond, the Seaboard will haul the loaded car over its own tracks from Oxford to Richmond and to industry "A," located upon its tracks, and will charge and collect from the shipper or receiver, the amount accruing under the Seaboard's published rate applying from Oxford to Richmond, and to any point upon its own tracks within the switching limits of the city.

If, on the other hand, a carload of freight is delivered to the Southern at Oxford for transportation and delivery at Richmond to industry "A," located upon the Seaboard's tracks, the Southern will haul the loaded car via its own route from Oxford to Richmond and to its point of connection at Richmond with the tracks of the Seaboard. At said point of connection the Southern will deliver the loaded car to the Seaboard, and the Seaboard will thereafter,

14 with its separate engine and crew, perform an additional service of switching the loaded car over its own tracks to industry "A." For this switching service the Seaboard will demand its published switching charge. The Southern, however, will absorb and pay to the Seaboard the amount of the said switching charge as provided by the Southern's switching tariff to which the line-haul rate is subject, and thereby make the through rate and total charge for, and cost to, the shipper or receiver, of the through transportation and delivery from Oxford to industry "A" via the Southern's route from Oxford, the same as if the shipment had been transported from Oxford by the Seaboard over its separate route and delivered by that carrier to industry "A."

If there were no point of physical connection at Richmond between the tracks of the Southern and the tracks of the Seaboard, so that the switching service of a third and intermediate carrier would be required in order to complete the delivery of the car to industry "A," located on the tracks of the Seaboard, the Southern would absorb both the switching charge of the Seaboard and the additional switching charge of the said intermediate carrier.

In like manner, on outbound carload traffic moving to Oxford, N. C., from industry "A," located at Richmond upon the tracks of the Seaboard, if the traffic is routed from Richmond to Ox-

15 ford via the Southern, that company will absorb the switching charge or charges for the switching service at Richmond between industry "A" and the Southern's own tracks, and thereby equalize the charges for the through service to the shipper or re-

ceiver with the charges of the competing carrier, in accordance with its duly established tariffs.

The reason for the absorption and payment of switching charges by the line-haul carrier, as described and illustrated above, is that the switching carrier, upon whose tracks at Richmond the industry is located, is an active competitor with the line-haul carrier, upon whose tracks the industry is not located, for the line-haul transportation of the traffic to or from Richmond. Unless the carrier upon whose tracks the industry is not located announced its willingness through its duly established tariffs to absorb and pay, and did in fact absorb and pay, the switching charge or charges for the separate movement of the loaded car to or from the point of connection within its own tracks, the total cost to the shipper or receiver of the whole movement of the traffic between the industry and the point of origin or destination, if the freight is routed via the line of said carrier, would exceed, by the amount of the switching charge, what the total cost to the shipper or receiver would be if the traffic were routed via the separate line or route of the competing carrier, upon whose tracks at Richmond the industry is located, and the
16 traffic would naturally and almost inevitably be delivered by the shipper to the last named carrier and transported by that carrier to or from Richmond. The result would be, petitioners aver, that the carrier upon whose tracks the industry is not located would obtain for its own route to or from Richmond no part of the transportation service, and would be deprived of the use of its property and the resulting revenue, while the shipper would be restricted to the one route, and competition would be practically eliminated.

When a carload of freight is transported to Richmond by one of the petitioners as the line-haul carrier, and is destined to an industry at Richmond within the said switching limits and not located on the tracks or sidings of the line-haul carrier and not upon the tracks or sidings of a carrier competing for the line haul as aforesaid, but located upon the tracks or sidings of a connecting carrier not competing for the line haul, the line-haul carrier will deliver the loaded car at its point of connection with the carrier upon whose tracks the industry is located, and the latter carrier will complete the transportation service by switching the car over its own tracks to the industry on its line, but the charge therefor of the switching carrier is not absorbed by the line-haul carrier and the through rate and charge is increased to that extent, and said switching charge is collected from the shipper or consignee by the line-haul car-
17 rier as a part of the total through rate or charge from origin to destination as provided in said tariffs.

VII.

Petitioners state that the method of handling outbound carload traffic from Richmond is substantially similar to the method of handling inbound traffic, and that if an industry at Richmond, which is not located upon its tracks, applies to any one of the peti-

tioners for the transportation as the line-haul carrier of a carload of freight from Richmond to any point, the said line-haul carrier will thereupon provide and furnish an empty car and will deliver it at its point of connection with the tracks of the carrier upon whose tracks the industry is located, or at its point of connection with the tracks of some intermediate carrier, and said connecting carrier, or carriers, will thereupon move the empty car to the plant of the industry. At that point the empty car is loaded and, thereupon, the carrier upon whose tracks the industry is located, or said carrier and the intermediate connecting carrier, will switch the loaded car each over its own tracks from the industry to the point of connection with the tracks of the line-haul carrier and will there deliver the car to the line-haul carrier upon the same conditions with respect to absorption of said switching charges out of, or the addition of said charges as a part of, the through rate as already set out in the case of inbound shipments.

18 VIII.

Petitioners state that the rules and practices hereinbefore described are the general rules and practices of the petitioners at Richmond, and were in effect at the time of the institution of the proceedings before the Interstate Commerce Commission, hereinafter to be mentioned, and that they have remained in effect continuously since that time and are now in effect.

IX.

On January 6, 1912, the Richmond Chamber of Commerce, an organization composed of manufacturers, merchants and business men of Richmond, Va., filed a complaint with the Interstate Commerce Commission, hereinafter called the Commission, against the petitioners and certain other companies, whereby the practices of the petitioners herein regarding the absorption of switching charges at Richmond were alleged to be in various respects unlawful and in violation of the act of Congress of February 4, 1887, as amended, commonly known as the Act to Regulate Commerce.

The said complaint was docketed upon the docket of the Commission as No. 4611 and a copy thereof was served upon each of the petitioners, and a copy thereof is annexed hereto and made a part hereof, marked Exhibit C.

19 On February 9, 1912, the petitioners filed their joint and several answer to said complaint, a copy of which answer is annexed hereto and made a part hereof, marked Exhibit D. Hearings were had and, thereafter, the Commission made and entered a report and order, dated June 8, 1914, the effective date of said order being September 1, 1914 (subsequently extended to October 1, 1914). Copies of the said report and order of June 8, 1914, are annexed hereto and made a part hereof marked, respectively, Exhibits E and F. Thereupon the petitioners, as defendants in said proceeding before the Commission, jointly filed with the Commission a petition for rehearing and, thereafter, the Commission made

and entered an order dated August 31, 1914, whereby the former order of June 8, 1914, was vacated and set aside, and the case was reopened for further hearing. A copy of said order of August 31, 1914, is annexed hereto and made a part hereof, marked Exhibit G.

Further hearing was thereupon had and thereafter, on April 28, 1917, the Commission made and entered a report upon rehearing and an order, both dated April 28, 1917, the effective date of said order being August 1, 1917. A copy of the said report of the Commission upon rehearing, together with the separate concurring and dissenting reports of certain commissioners, is annexed hereto and made a part hereof, marked Exhibit H, and a copy of the said order, dated April 28, 1917, is annexed hereto and made a part hereof, marked Exhibit I.

20 By subsequent orders, dated respectively June 25, 1917, September 29, 1917, and October 20, 1917, the effective date of the said order of April 28, 1917, was extended to January 1, 1918. Copies of the said orders of June 25, 1917, September 29, 1917, and October 20, 1917, are annexed hereto and made a part hereof, marked Exhibits J. K, and L, respectively.

By the said order of April 28, 1917, as amended with respect to its effective date, the petitioners and each of them are notified and required, on or before January 1, 1918, to cease and desist, and thereafter for a period of not less than two years from January 1, 1918, to abstain

"* * * from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions"

such practice having been found by the Commission, and stated in the order, to be unjustly discriminatory and unlawful in violation of section 2 of the aforesaid Act to Regulate Commerce.

Petitioners, and each of them, are further notified and required by said order, on or before January 1, 1918:

"to establish * * * upon notice to this Commission and to the general public by not less than 30 days' filing and post-
21 ing in the manner prescribed in section 6 of the Act to Regulate Commerce, and thereafter to maintain and apply uniform regulations and practices for the absorption of charges for the switching of interstate carload freight at Richmond, Va.; and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions."

In the report of April 28, 1917, which is referred to by the Commission in its order of the same date and made a part of said order, the Commission, in defining the meaning and scope of the order,

uses a certain diagram and illustration; and referring to said dia
gram, it is said in the report (at p. 462):

"The accompanying diagram shows the situation. Oxford, N. C
is a point reached both by the Southern and the Seaboard, but no
by the Chesapeake & Ohio. Norlina, N. C., is a local point on th
Seaboard. Assume that industries A, B, and C on the Seaboard, th
Southern, and the Chesapeake & Ohio, respectively, are similarly
located with regard to the interchange tracks of the three carrier
at Richmond. On traffic from Oxford to industry B on the South
ern, the Seaboard will absorb the Southern's switching charges. Bu
on traffic from Oxford to industry C, on the Chesapeake &
22 Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio
switching charges. On traffic from and to Norlina, a local
point, however, the Seaboard refuses to absorb all switching charge
whatsoever to any off-line industry."

Thereafter, the conclusion is expressed in the report that:

"Where the industries are situated within the switching district o
the same city and are substantially equidistant from the respectiv
interchange tracks, we are of the opinion that the service which th
line-haul carrier renders, whether the traffic is ultimately destine
to industry B or industry C, is like service within section 2. It is th
line-haul movement which that section primarily contemplates
Where the short delivery service within the switching district is sub
stantially the same in either instance, we are of the opinion that th
line-haul carrier is receiving a greater compensation from one ship
per than from another for a like service when it absorbs the switch
ing charges of one switching line and not those of another." (Re
port of Apr. 28, 1917, p. 466.)

The Commission further said:

"We do not consider that the carriers must absorb the switchin
charges indiscriminately to all industries within the switching limit
of Richmond if they choose to absorb the switching charges to an
one industry off their rails. The illegality herein found to exist i
the receiving of a greater compensation for one service tha
23 for a like service under substantially similar circumstances an
conditions. To take a concrete example and referring again
to the diagram. Suppose industry C were 5 miles distant from th
interchange tracks of the Seaboard, while industry B were only
miles distant. Suppose the Chesapeake & Ohio's switching charg
amounted to $5, while that of the Southern was $2. If the Seaboar
absorbed the Southern's $2 switching charge on traffic to industr
B, we do not consider that it must absorb the entire $5 switchin
charge of the Chesapeake & Ohio on traffic, to industry C, but only t
the extent to which the service is similar. In other words, it woul
probably be necessary for the Seaboard to absorb $2 of the $5 charg
of the Chesapeake & Ohio.

"We are of opinion, therefore, and find, that the practice of th
Southern lines of absorbing switching charges only when the switch

ing line actually competes with the line-haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful." (Rep., p. 466.)

Petitioners state that if the said order of April 28, 1917, as defined and explained in the accompanying report, is allowed to become effective, and remain in effect, each of the petitioners will be required thereby, under the heavy penalties of the statute, either to discontinue altogether its practice as hereinbefore set forth of absorbing, as the line-haul carrier of inbound or outbound carload traffic to or from Richmond, the switching charge, or charges, of connecting carriers at said city for switching to or from industries located upon the tracks of any competing carrier, as already described and set forth in this petition, and thereby abandon its opportunity to obtain on equal terms with its competitor the profitable line-haul transportation of the traffic, or else to absorb and pay numerous other switching charges of connecting carriers at Richmond, although said charges are for switching to or from industries which are not located upon the tracks of any competing carrier as already set forth. Petitioners, as line-haul carriers, will be thereby subjected to a heavy burden of continuing expense amounting, as to each of the petitioners, to largely in excess of two thousand dollars ($2,000), or else be forced to sacrifice the line-haul traffic as aforesaid, inflicting upon each of petitioners losses many times in excess of two thousand dollars ($2,000).

X.

Petitioners aver that the aforesaid order of April 28, 1917, as made and entered by the Commission, acting in its capacity of agent and representative of the defendant herein, is illegal and void, and that the Commission is without jurisdiction, power or authority in law to make and enforce said order; that the facts respecting the petitioners' switching and absorption practices at Richmond were developed in the pleadings and at the hearings before said Commission and were and remain undisputed in any substantial particular, and said order was made because of a mistake of law in the interpretation of the Act to Regulate Commerce, as amended, under which act alone the Commission proceeded, and that said order was beyond the power of the Commission to make and transcends the limits of the authority vested in said Commission under the aforesaid act or any other acts of Congress; that said order is in violation of the Act to Regulate Commerce; that said order is indefinite and uncertain in its terms and requirements, and therefore, is impossible of compliance; and that said order is confiscatory and operates to take the petitioners' property without due process of law and denies to them the equal protection of the laws in violation of the Constitution of the United States and its amendments.

Petitioners aver that the Commission proceeded upon a mistaken interpretation of section 2 of the Act to Regulate Commerce, as

amended, in holding that said section 2 has any application at all upon the facts shown, and found by said Commission, or that said facts are within the purview of said section, and in finding and holding that when any one of the petitioners, as the line-haul carrier of carload traffic to or from Richmond, absorbs and pays the switching charge or charges of connecting carriers at said city for switching to or from an industry located upon the tracks of a competing carrier, as described in this petition and in the Commission's reports aforesaid, but refuses to absorb and pay any part of the switching charge or charges of connecting carriers for switching to or from other industries, which are not located upon the tracks of a competing carrier, as described, but are upon the tracks of some other carrier in said city, the said line-haul carrier is thereby guilty of charging, collecting or receiving from the shipper or receiver in the one case, by means of a special rate, rebate, drawback or other device, a less compensation for the service rendered to the shipper or receiver in the transportation of the traffic than it charges, collects or receives from the shipper or receiver in the other case, for doing for said last-named shipper or receiver a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, within the meaning of said section 2 of the Act to Regulate Commerce.

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Petitioners aver that neither does the shipper or receiver of the freight receive and enjoy, nor does the line-haul carrier render, in the one case as described above, as to which the switching charge is absorbed, a "like and contemporaneous" service under "substantially similar circumstances and conditions," as compared with the service received by the shipper or receiver or rendered by the line-haul carrier in the other case, as to which no part of the switching charge is absorbed. They aver that in either case the service of the switching carrier, or carriers (if the car is switched by more than one), in hauling the loaded car, each over its own separate tracks with its own engine and crew, between the industry and the point of connection and interchange with the tracks of the line-haul carrier, is just as much a service of "transportation," within the meaning of section 2, as is the service of the line-haul carrier in hauling the loaded car over its own tracks to or from Richmond and to or from the point of interchange in said city, and that the service performed by the line-haul carrier and the said additional switching service, or services, performed by the connecting and switching carrier or carriers, together make up the amount of a through service of transportation to or from the industry, covered by and embraced in the published tariffs governing the total through charges; and they aver that the said through service of transportation received by the shipper or receiver of the freight in the one case, as above mentioned, is not a "like" service, nor is it one rendered under "substantially similar circumstances and conditions" to that received in the other case because it is neither over the same lines, nor in the same direction, nor for the same distance, nor is the service performed by the same carriers. On the contrary, the one shipper or receiver of the freight

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receives a greater or less amount of transportation service than the other, which is performed by different carriers, and at a greater or less amount of cost to the carriers, depending upon the location of the respective industries, the location of the respective points of interchange and connection with the line-haul carrier, and the actual length of the respective switching hauls to or from the industry. Petitioners aver that the shippers or receivers are not similarly situated in each case, nor are the circumstances and conditions "substantially similar," and that under the conditions stated, and irrespective of whether or not the cars are loaded wtih the same kind or variety of freight, there can be under no circumstances any violation of section 2 of the said act, and that the Commission, in making its aforesaid reports and order, proceeded upon a mistaken interpretation of said section.

Petitioners aver that the transportation service from the point of origin to the industry at Richmond, as already set out, is not ended or concluded until the property transported is delivered at said industry. The line-haul movement of the originating carrier to its point of connection at Richmond with the delivering carrier upon whose tracks the industry is located is but a part of such through transportation. The haul by such connecting line for delivery to the industry is necessary to complete the through transportation. The delivery by the switching line to an industry on its tracks when said switching line competes for the line-haul on the through rate necessitates the absorption of its switching charges by the competing originating line in order to secure the traffic for its own line. Delivery to an industry on its tracks when made by a switching line not competing for the line-haul does not necessitate the absorption of its switching charges out of the through rate. The two services are different and distinct and not "like and contemporaneous" nor are the circumstances and conditions "substantially similar" within the meaning of said section 2 of said act.

To illustrate:

On traffic moving from Oxford via the Southern to an industry at Richmond on the Seaboard the Southern charges the through rate and absorbs the switching charges at Richmond of the Seaboard, which competes with it for the haul from Oxford; but to an industry at Richmond on the Chesapeake & Ohio, which does not reach Oxford and does not compete for the traffic, the Southern does not absorb the switching charges of the Chesapeake & Ohio, and said through rate and charge to the industry on the Chesapeake & Ohio is increased to that extent. Petitioners aver that the service is not "like and contemporaneous" in each of said instances within the meaning of section 2 of the act and that the Commission in holding to the contrary based its order upon a mistake of law.

Petitioners further aver that they and each of them have the legal right to make different rates to and from separate and distinct industries on separate and distinct railroads in Richmond based upon all the facts bearing thereon and distinguishing one from another, and this right is denied petitioners under the report and order of the Commission in this case.

Petitioners aver that the aforesaid absorption and payment by the line-haul carrier to its connection, made in accordance with the openly announced and published rule and practice of said line-haul carrier, set out in tariffs duly filed, constitutes in no sense whatever the making or giving to the shipper or receiver of the freight of any special rate, rebate, drawback or other device, within the meaning of section 2; and that no shipper, receiver or kind of traffic is thereby subjected to any unfair or unreasonable detriment or disadvantage in any respect whatever.

Petitioners aver that as between the aforesaid industries and carload shipments, the services rendered by the line-haul carrier are not "like" nor performed "under substantially similar circumstances and conditions" within the meaning of section 2, for the further reason that in the case of very many, if not most, shipments to or from Richmond, the line-haul carrier itself performs, with its own engines and crews and over its own tracks, a different transportation service, after the arrival of the car at Richmond or before it leaves said city, as the case may be, in hauling the loaded
31 car to or from its respective points of connection and interchange in said city with the tracks of other carriers. They aver that the diagram and illustration used by the Commission in its report of April 28, 1917, fails to exemplify the true situation as set out in the report, and in fact existing at Richmond, in that in making said diagram and illustration it is assumed that the points of interchange and connection between the tracks of all of the carriers therein mentioned is the same point, whereas the said carriers do not, in fact, connect and interchange traffic at the same point but their respective points of connection and interchange are, on the contrary, widely separated; and when the Seaboard, for example, as the line-haul carrier, desires to deliver a loaded car at industry "C" on the tracks of the C. & O., as referred to in said diagram, the Seaboard hauls the car for a greater distance and over a different portion of its own tracks, in order to place the car at its point of connection with the C. & O., than would be the case if the car were destined to industry "B" on the tracks of the Southern, and were delivered by the Seaboard at its point of connection with the Southern; and the Seaboard thereby performs a different and greater amount of transportation service, rendered at a greater cost to said carrier, in the one case than in the other. And if the car were destined to an industry located on the tracks of the R., F. & P., it would be hauled by the Seaboard over still other tracks of its own
32 at Richmond and for a distance several miles greater than in either case above mentioned and at correspondingly greater cost to said carrier. Petitioners aver that this haul by the line-haul carrier over its own tracks at Richmond is as much a part of the through service of transportation rendered by said carrier, and received by the shipper or receiver of the freight, as is any other part of the movement of the loaded car and that whenever said hauls by the line-haul carrier, in order to reach its respective points of connection and interchange with other carriers, are over different tracks and for different distances, as illustrated above, the said services are not "like" services within the meaning of section 2.

Petitioners aver that the order of the Commission is in violation of the Act to Regulate Commerce for the reasons aforesaid, and for the further reason that the purpose and effect of the order is to require each of the petitioners, as a line-haul carrier, to desist altogether (except at the heavy cost of making many other absorptions and payments) from absorbing and paying the charge or charges for switching between its own tracks and any industry located upon the tracks of its competitor, although said absorption and payment were made solely for the purpose of applying through rates to and from said industry and thereby obtaining an opportunity to compete on equal terms, as to rates to the shipper, for the transportation of the traffic, and the order, therefore, operates to break down and destroy legitimate, fair and open competition between the carriers, notwithstanding the fact that the purpose and intent of the act is to encourage and promote such competition.

Petitioners aver that the said order is indefinite and uncertain in its terms and requirements and, therefore, impossible of compliance, in that nowhere in the order, or the accompanying reports, is there any showing of what services the Commission finds and holds to be "like and contemporaneous," or performed "under substantially similar circumstances and conditions," nor of what shipments the Commission finds to be "like carload shipments" within the meaning of the order, with sufficient clearness to notify the petitioners with certainty what steps are required to be taken in order to comply therewith. Although it is said in the report of April 28, 1917, that the absorption, if made at all, must be made in both cases "where the short delivery service within the switching district is substantially the same in either instance," it is nowhere clearly shown whether the Commission thereby means to say that the absorption must be made wherever the switching charges are the same in each instance although the actual length of the switching haul is, as very frequently happens, substantially greater in the one case than in the other, or whether the absorption must be made only where the length of the actual switching movements is substantially the same, which, in the great majority of instances, is not the case. If the meaning is as last stated, there is no definite showing of what amount of difference in the length of the switching hauls is sufficient to make the services not "substantially the same" in the Commission's view, whereby the petitioners are advised in what manner their tariffs can be so framed and published as to make effective the Commission's requirements, and at the same time avoid constant confusion and discrimination; and neither are they advised, nor do they now know whether the uniformity of absorption, which the order purports to require, has reference to any and all loaded cars of freight, or only to cars loaded with the same kind of variety of freight, such, for example, as fertilizer.

Petitioners aver that in holding, as indicated in the report of April 28, 1917 (pp. 466-7), that if the line-haul carrier absorbs all of the switching charge of a competing carrier for switching to or from one industry, located on said competitor's tracks, it must also absorb a like amount of the switching charge of other carriers for

switching to or from other industries, although not located upon the tracks of a competing carrier, and although the length of the switching haul and the amount of the switching charge are both materially greater in the second case than in the first, the Commission proceeded upon a mistaken interpretation of said section 2 in that in the two instances the services of transportation rendered by the line-haul carrier, or received by the shipper or receiver, are plainly not "like and contemporaneous" nor are they performed "under substantially similar circumstances and conditions."

Petitioners aver that their rules and practices with respect to the absorption and payment of switching charges at Richmond, as hereinbefore described, are the same with their rules and practices at many other places, including many large cities and towns, reached and served by their respective lines, and are the same with those of many other carriers operating in the same general territory with the petitioners, and to which business and commercial conditions have now long since become adjusted; and they aver that if the aforesaid order, as made and entered by the Commission, is allowed to become effective and remain in effect, and the same principle applied at other points, the inevitable result will be a most radical and sweeping derangement of the practices as to switching and absorption of switching charges of the petitioners and of many other carriers throughout the country with a consequent serious disturbance of the business of the shipping public, and if absorptions of switching charges, as required as an alternative to the loss of competitive traffic, are made generally under the principle laid down for application at Richmond, the losses to your petitioners will amount to hundreds of thousands of dollars.

Petitioners aver that unless an interlocutory injunction be issued herein, enjoining the execution and enforcement of the aforesaid order during the pendency of this suit, great and irreparable injury will result to them and each of them, for the reason that each of them will either suffer a heavy loss of line-haul revenues, amounting to many thousands of dollars, which will go to its competitors, or else will be compelled to pay out large sums of money, amounting to many thousands of dollars, in the absorption and payment of numerous switching charges of other carriers at Richmond, none of which can ever be recovered.

Petitioners further aver that, although the order herein complained of does not become effective until January 1, 1918, petitioners will be required thereby to prepare, publish and file new tariffs for their own use and the use of the Commission and the public, on or before December 2, 1917, in order to give the thirty days' notice prescribed by said order, which will necessitate the furnishing of said new tariffs to the printers not later than November 22, 1917. They aver that, in addition to the expense of printing, there is involved also the expense and labor of distributing these new tariffs, to the number of more than 4,000, to all of their local freight agents over their respective systems, as well as to their general

division and soliciting representatives throughout the country, and to certain shippers. Petitioners aver that if the court is not prepared to render its decision upon the motion for an interlocutory injunction before November 22, 1917, they are entitled to a temporary restraining order, to be in force until the motion for an interlocutory injunction is passed upon, not only because the expense and labor of promulgating the new tariffs would be unnecessary if the court should grant such interlocutory injunction, but also because in that event it would be necessary to proceed to cancel said new tariffs and reissue the old tariffs, and the public generally, and particularly the shippers over the petitioners' lines of railroad wherever located, would be greatly inconvenienced thereby because of the confusion and complications which would necessarily arise out of the issue of the new tariffs and their early cancellation and reissue of the old ones.

Wherefore, the petitioners pray:

(1) That an interlocutory injunction be issued herein suspending and restraining the enforcement, operation and execution of the aforesaid order of April 28, 1917, made and entered by the Interstate Commerce Commission and herein complained of, together with the subsequent orders of June 25, 1917, September 29, 1917, and October 20, 1917 (whereby the effective date of said order of April 28, 1917, is extended, but in all other respects the said order is made to remain in full force and effect) pending the final hearing and determination of this suit; and if the motion for an interlocutory injunction is not decided on or before November 22, 1917, that a restraining order of like effect be issued to remain in force until the motion for an interlocutory injunction is disposed of.

(2) That upon final hearing a decree be entered herein setting aside and annulling said orders, and perpetually enjoining the defendant, its agents, servants and representatives from enforcing the same, and from taking any steps or instituting any proceedings for the enforcement thereof or for the collection of any penalties for failure to comply therewith.

(3) That a writ of subpœna be granted and directed to the defendant, commanding it at a certain date and under a certain penalty specified to appear and make full and complete answer to all and singular the premises herein, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such orders and decrees herein as shall seem meet and proper in equity and good conscience.

And petitioners pray for their costs, and for such other and further relief as justice and equity may require.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

39 UNITED STATES OF AMERICA,
District of Columbia, ss:

Personally appeared before me, D. Lynch Younger, a Notary Public in and for the District of Columbia aforesaid, Lincoln Green who, being duly sworn, deposes and says that he is Vice-President of Southern Railway Company, one of the foregoing petitioners; that he has charge of and supervision of the traffic affairs of said company, and is familiar with the matters set out in said petition and involved in this proceeding; that he has read the foregoing petition and knows the contents thereof, and that the facts stated in said petition are true, as he verily believes.

LINCOLN GREEN.

Subscribed and sworn to before me at my office in the City of Washington, District of Columbia, this 5th day of November, 1917.
My commission expires February 26, 1922.

[NOTARIAL SEAL.] D. LYNCH YOUNGER,
Notary Public.

(Here follows map and tariff marked pages 40 and 41).

MAPS

TOO

LARGE

FOR

FILMING

EXHIBIT B.

Distances Between

A. C. L.—R. F. P. (Clopton) Interchange track and		A. C. L. Manchester yard, Sou. Rich.	2.3 mi.
A. C. L.—R. F. P. (Clopton) Interchange track	"	A. C. L. 9th street yard	3.2 "
A. C. L.—C. & O. Interchange track	"	A. C. L. 9th street yard	0.3 "
A. C. L.—C. & O. Interchange track	"	A. C. L. Manchester yard (Sou. Rich.)	0.9 "
A. C. L.—Sou. Ry. Interchange track	"	A. C. L. Manchester yard (Sou. Rich.)	0.7 "
A. C. L.—Sou. Ry. Interchange track	"	A. C. L. 9th street yard	1.0 "
S. A. L.—R. F. & P. Interchange track	"	S. A. L. 15th street yard	3.8 "
S. A. L.—R. F. & P. Interchange track	"	S. A. L. Manchester yard (Sou. Rich.)	6.6 "
S. A. L.—C. & O. Interchange track	"	S. A. L. 15th street yard	0.6 "
S. A. L.—C. & O. Interchange track	"	S. A. L. Manchester yard (Sou. Rich.)	2.5 "
S. A. L.—Sou. Ry. Interchange track	"	S. A. L. Manchester yard (Sou. Rich.)	1.3 "
S. A. L.—Sou. Ry. Interchange track	"	S. A. L. 15th street yard (Rich.)	2.0 "
Sou. Ry.—C. & O. Interchange track	"	28th street yard (Sou. Ry.)	0.9 "
Sou. Ry.—C. & O. Interchange track	"	Trigg yard (Sou. Ry.)	1.2 "
Sou. Ry.—C. & O. Interchange track	"	14th street yard (Sou. Ry.)	1.8 "
Sou. Ry.—C. & O. Interchange track	"	Manchester or Sou. Rich. yard (Sou. Ry.)	2.6 "
Sou. Ry.—C. & O. Interchange track	"	Rocketts Wharf (Sou. Rich.) (Sou. Ry.)	3.7 "
Sou. Ry.—C. & O. Interchange track	"	Belle Isle yard (Sou. Ry.)	2.9 "
Sou. Ry.—A. C. L. Interchange track	"	Belle Isle yard	0.2 "
Sou. Ry.—A. C. L. Interchange track	"	Manchester or Sou. Rich. yard	0.9 "
Sou. Ry.—A. C. L. Interchange track	"	Rocketts Wharf (Sou. Rich.)	1.9 "
Sou. Ry.—A. C. L. Interchange track	"	14th street yard	1.3 "
Sou. Ry.—A. C. L. Interchange track	"	Trigg yard	1.9 "
Sou. Ry.—A. C. L. Interchange track	"	28th street yard	2.1 "
Sou. Ry.—S. A. L. Interchange track	"	Manchester or Sou. Rich. yard	0.4 "
Sou. Ry.—S. A. L. Interchange track	"	Rocketts Wharf	0.6 "
Sou. Ry.—S. A. L. Interchange track	"	Belle Isle yard	1.1 "
Sou. Ry.—S. A. L. Interchange track	"	14th street yard	1.2 "
Sou. Ry.—S. A. L. Interchange track	"	Trigg yard	1.8 "
Sou. Ry.—S. A. L. Interchange track	"	28th street yard	2.1 "

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EXHIBIT C.

Docket No. 4611.

Filed Jan. 6, 1912.

Interstate Commerce Commission.

Before the Interstate Commerce Commission.

Docket No. —.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY, ATLANTIC COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, AND RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY.

Petition.

The petition of the above-named complainant respectfully shows:

I.

That complainant is an organization composed of the manufacturers, merchants, and business men of the city of Richmond, Virginia, having as one of its objects the promotion of the welfare and business interests of said city; that the several members of said Richmond Chamber of Commerce are engaged in manufacturing
43 and in buying and selling various commodities and shipping the same between Richmond and various points in other States over the lines of defendants and their connections.

II.

That each of the defendants above named is a common carrier engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by railroad, between points in the State of Virginia and points in various other States of the United States, and as such common carrier is subject to the provisions of the Act to regulate Commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III.

(a.) That during a long period of time prior to November 6, 1909, the defendant, Seaboard Air Line Railway Company, applied the same rates from industries in the city of Richmond, located on the lines of the Chesapeake & Ohio Railway Company, the Richmond,

Fredericksburg & Potomac Railroad Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company, as were named to apply on traffic originating in Richmond on its own rails, by the absorption of the switching charges published by said other carriers, said switching charges being absorbed on carload shipments of freight originating at, or destined to, all points on and reached via the Seaboard Air Line; that effective November 6, 1909, tariff I. C. C. No. 3 was issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Southern Railway Company, which provided for the absorption of switching charges on freight in the transportation of which the Seaboard Air Line competed with the switching line, i. e., the Chesapeake & Ohio Railway, the Richmond, Fredericksburg & Po-
44 tomac Railroad, the Southern Railway, and the Atlantic Coast Line; that effective October 1, 1910, tariff I. C. C. No. A-1680 was issued by the Seaboard Air Line Railway, providing that "Seaboard Air Line Railway will absorb the lawfully published switching charges of the Atlantic Coast Line, Chesapeake & Ohio Railway, Richmond, Fredericksburg & Potomac Railroad or Southern Railway on carload shipments of freight originating at or destined to competitive points" (the same tariff defines "competitive points" as being "all points not included in the definition of non-competitive points"; and "non-competitive points" as being points reached only by the Seaboard Air Line Railway, or points reached only by certain other railroads therein named); that effective June 20, 1911, Seaboard Air Line tariff, I. C. C. No. A-1944 was issued, which provides in effect that the Seaboard Air Line Railway will absorb switching charges at Richmond only on traffic which is destined to points at which the Seaboard Air Line Railway competes with lines operating at Richmond; that the effect of said changes in the rules will result in substantial increases in the aggregate charges on freight from and to Richmond and numerous points on and reached via the Seaboard Air Line Railway.

(*b.*) That under the provisions of its tariff I. C. C. No. A-1804, effective March 10, 1911, the Seaboard Air Line Railway Company heretofore absorbed "the lawfully published switching charges of the Chesapeake & Ohio Railway or the Southern Railway on carload shipments of fertilizer destined to all points," whereas under said tariff I. C. C. No. A-1944, shipments of fertilizer originating on the rails of the other carriers referred to are subjected to the general rule, which results in greatly restricting the absorption of switching charges on such shipments.

(*c.*) That under the provisions of tariff I. C. C. No. A-1804, aforesaid, the Seaboard Air Line Railway Company provided for the absorption of switching charges on so-called "trap," "peddler,"
45 and "station-order" cars loaded at points on the Atlantic Coast Line Railroad, the Chesapeake & Ohio Railway, the Richmond, Fredericksburg & Potomac Railroad or the Southern Railway, "when such trap, peddler or station-order cars contain 3,200 or more pounds of freight destined to competitive points; and "when such trap, peddler or station-order cars contain less than 3,200 pounds

of freight destined to competitive points Seaboard Air Line Railway will absorb all the switching charges which the Atlantic Coast Line Railroad, Chesapeake & Ohio Railway, Richmond, Fredericksburg & Potomac Railroad or Southern Railway may make in excess of an aggregate charge of $2.00 per car"; whereas under the provisions of said tariff I. C. C. No. A-1944, the Seaboard Air Line Railway Company provides for the absorption of only such proportion of the switching charges accruing on any such cars above described, loaded at points on the lines named, as may be in excess of $2 per car.

(*d.*) That under the proviisons of tariff I. C. C. No. A-1804, aforesaid, no charge was made for the switching of so-called trap, peddler or station-order cars loaded at points on the lines of the Seaboard Air Line Railway Company within its Richmond, Va., switching limits, whereas under the provisions of said tariff, I. C. C. No. A-1944, a charge of $2 per car is added for such service.

IV.

(*a.*) That during a long period of time prior to November 6, 1909, the defendant, Atlantic Coast Line Railroad Company, applied the same rates from industries in the city of Richmond, located on the lines of the Chesapeake & Ohio, Southern Railway, Richmond, Fredericksburg & Potomac Railroad, and the Seaboard Air Line Railway as were named to apply on traffic originating in Richmond on its own rails, by the absorption of the switching charges pub-
46 lished by said other carriers, said switching charges being absorbed on carload shipments of freight originating at, or destined to, all points on and reached via the Atlantic Coast Line Railroad; that effective November 6, 1909, tariff I. C. C. No. 3 was issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Southern Railway Company, which provided for the absorption of switching charges on freight in the transportation of which the Atlantic Coast Line competed with the switching line, i. e., the Chesapeake & Ohio Railway, the Richmond, Fredericksburg & Potomac Railroad, the Southern Railway, and the Seaboard Air Line Railway.

(*b*) That during a long period of time prior to June 15, 1911, the Atlantic Coast Line Railroad Company absorbed the switching charges assessed by the Chesapeake & Ohio Railway and the Southern Railway on carload shipments of fertilizers originating on the lines of those carriers at Richmond, "when destined to points on or reached via the Atlantic Coast Line Railroad," said provision having been published in supplement No. 1 to I. C. C. No. 8, effective March 7, 1910, and in tariff I. C. C. No. 14, effective July 15, 1910, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, and Southern Railway Company; that effective June 15, 1911, supplement No. 3 to said tariff I. C. C. No. 14 was issued canceling and superseding supplement No. 2 to the same tariff, and providing that "regular rules and regulations named in tariff, as amended, will govern," thereby abrogating the practice of absorbing switching

charges on shipments of fertilizer from Richmond to various points of destination.

(c) That under the provisions of tariff I. C. C. No. 8, effective February 5, 1910, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, and Southern Railway Company, the defendant, At-
47 lantic Coast Line Railroad Company, through the operation of section III of page 3 of that tariff, provided for the absorption of switching charges on so-called "trap," "peddler," and "station-order" cars loaded at points on the Chesapeake & Ohio Railway, Richmond, Fredericksburg & Potomac Railroad, Seaboard Air Line Railway, and Southern Railway, within their Richmond switching limits, when such "trap," "peddler," or "station-order" cars contained 10,000 or more pounds of less-than-carload freight to be transported via its line; whereas, under the provisions of tariff I. C. C. No. 14, effective July 15, 1910, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company and Southern Railway Company, the defendant, Atlantic Coast Line Railroad Company, through the operation of section 5 of page 3 of said tariff, provided for the absorption of only such proportion of the switching charges accruing on said cars loaded at points on the lines named as might be in excess of $2.00 per car.

(d) That under the provisions of tariff I. C. C. No. 8, aforesaid, no charge was made by said defendant, Atlantic Coast Line Railroad Company, for the switching of so-called "trap," "peddler," or "station-order" cars loaded at points on its line within its Richmond, Virginia, switching limits; whereas, under the provisions of said tariff I. C. C. No. 14, a charge of $2.00 is added for such service.

V.

(a) That during a long period of time prior to November 6, 1909, the defendant, Southern Railway Company, applied the same rates from industries in the city of Richmond located on the lines of the Chesapeake & Ohio Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, the Atlantic Coast Line Railroad Company, and the Seaboard Air Line Railway Company,
48 as were named to apply on traffic originating in Richmond on its own rails, by the absorption of the switching charges published by said other carriers, said switching charges being absorbed on carload shipments of freight originating at, or destined to, all points on and reached via the Southern Railway; that effective November 6, 1909, tariff I. C. C. No. 3 was issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway and Southern Railway Company, which provided for the absorption of switching charges on freight in the transportation of which the Southern Railway competed with the switching line, i.e., the Chesapeake & Ohio Railway, the Richmond, Fredericksburg & Potomac Railroad, the Atlantic Coast Line and the Seaboard Air Line Railway.

(b) That during a long period of time prior to July 5, 1911, the defendant, Southern Railway Company, carried the same provisions

in its tariffs whereby switching charges of the Chesapeake & Ohio Railway Company on carload shipments of fertilizers originating on the lines of the last-named company and "destined to points on or reached via Southern Railway" were absorbed; but that effective July 5, 1911, supplement No. 5 to Southern Railway tariff I. C. C. No. 4052 was issued abrogating such practice and thereby bringing about substantial increases in the aggregate freight charges on such shipments between Richmond and numerous points.

(*c*) That prior to November 6, 1909, the defendant, Southern Railway Company, provided for the absorption of switching charges on so-called "trap," "peddler," or "station-order" cars loaded at points on the Atlantic Coast Line Railroad Company, Chesapeake & Ohio Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, and Seaboard Air Line Railway Company, when said cars contained 10,000 or more pounds of freight to be transported via its line, and made no charge for the switching of such cars when
49 loaded at points on its own line within its Richmond, Virginia, switching limits; whereas under I. C. C. No. 3, effective November 6, 1909, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, and Southern Railway Company, no provision was made therefor.

(*d.*) That under the provisions of I. C. C. No. 8, effective February 5, 1910, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, and Southern Railway Company, the defendant, Southern Railway Company, in paragraph (*b*) of section III, page 5 of said tariff, provided for the free switching of so-called "station-order" cars originating at points on its own line within its Richmond, Virginia, switching limits, when destined to points on or reached via its line.

(*e.*) That under the provisions of paragraph (*c*) of section III, page 5 of said I. C. C. No. 8, the said defendant, Southern Railway Company, imposed a switching charge on so-called "trap" or "peddler" cars containing freight destined to points on or reached via its line of $2.00 per car, whether originating at points on its own line within its Richmond, Virginia, switching limits, or at points within the Richmond, Virginia, switching limits of the Atlantic Coast Line Railroad Company, Chesapeake & Ohio Railway Company, Richmond, Fredericksburg & Potomac Railroad Company or Seaboard Air Line Railway Company, and received from said companies for forwarding to points on and reached via its line.

(*f.*) That under the provisions of tariff I. C. C. No. 14, effective July 15, 1910, issued by John A. Ryan as agent for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, and Southern Railway Company, the defendant, Southern Railway Company, so modified its rules as per paragraph (*e*) to section 4 and section 8, as to make no charge for switching
50 "trap," "peddler" or "station-order" cars loaded at points within the Richmond, Virginia, switching limits of the Atlantic Coast Line Railroad, the Chesapeake & Ohio Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Seaboard Air Line Railway Company, and delivered to said defendant company for transportation via its line, but im-

posed a switching charge of $2.00 per car on such "trap," "peddler" or "station-order" cars loaded at points on its own lines within its Richmond, Virginia, switching limits, and provided for the absorption of all switching charges which said connecting lines might make in excess of an aggregate charge of $2.00 per car, said rules being at present in force in its tariffs I. C. C. A-4050 and I. C. C. A-4052, effective February 1, 1911.

VI.

That the changes in tariff provisions hereinabove referred to under paragraphs III, IV, and V of this petition, and the consequent imposition directly upon the shippers of the switching charges on various kinds of freight traffic originating on the lines of the several carriers serving industries in the city of Richmond, Va., establish increased rates and result in substantially increasing the aggregate transportation charges heretofore published on various classes of freight from and to Richmond and numerous points in other States; that said increased charges are unreasonable and unjust, and subject the members of complainant's association, their traffic and the city of Richmond to undue and unreasonable prejudice and disadvantage as compared with other competitive points, particularly Norfolk, Va., Louisville, Ky., Cincinnati, Ohio, St. Louis, Mo., Memphis, Tenn., etc.; that the action of the defendants, the Seaboard Air Line Railway Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company, each, in canceling and superseding their respective tariffs providing, in effect, for the application of the Richmond, proper, rates on traffic shipped from or
51 destined to industries located on the rails of the other railroad companies operating at Richmond in the same manner and under the same arrangements as had been voluntarily established and maintained by said defendants during a long period of time resulted in the abrogation of "through routes and just and reasonable rates applicable thereto," the establishment of which said routes and rates is imposed as a duty upon defendants under the provisions of section 1 of the Act to Regulate Commerce; that the application of the Richmond rates in favor of certain industries located on the rails of one of said defendants and the charging of amounts in addition to the Richmond rates on traffic moving between points served by said defendant and industries located in Richmond on the rails of other of the said defendants (the said unequal application of rates as between industries in Richmond being accomplished under the guise of a discontinuance of the practice of absorbing switching charges as hereinabove described) works undue prejudice and disadvantage against certain classes of traffic and certain of the industries of Richmond, which were originally located or have been developed in reliance upon the continuance of Richmond rates without said additional charges, and gives undue preference and advantage to certain other industries at Richmond, all of which is in violation of the Act to Regulate Commerce, as amended, and more particularly sections 1, 2, 3 and 4 thereof.

Wherefore complainant prays that the defendants be required to answer the charges herein and to assume the burden of justifying said advances in their transportation charges, as hereinabove described; that after due hearing and investigation an order be made, commanding said defendants to wholly cease and desist from the aforesaid violations of law; that the Commission fix just and reasonable rates of transportation between Richmond, Va., and the points of origin or destination in other States on the lines of the several defendants, and to this end require, in so far as may be necessary, the establishment of through routes and just and reasonable
52 rates applicable thereto between the industries located in the city of Richmond on the lines of each of the defendants and points in other States on the lines of each of the several other defendants; that opportunity be given complainant's members hereafter to submit evidence of shipments moving within the period of two years last past, which said shipments have been subjected to unjust and unreasonable transportation charges as above described, and that the Commission upon this proceeding determine and adjudge the basis upon which reparation shall be made on account thereof; and that such other and further order be made as the Commission may deem necessary in the premises.

Dated at Washington, D. C., this 6th day of January, A. D. 1912.

RICHMOND CHAMBER OF COMMERCE,
By HENRY W. WOOD,
President.

WILLIAM A. GLASGOW, JR.,
CHARLES D. DRAYTON,
Attorneys.

53 EXHIBIT D.

Before the Interstate Commerce Commission.

Docket No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY et al.

The Joint and Several Answer of The Seaboard Air Line Railway, The Atlantic Coast Line Railroad Company, the Southern Railway Company, and The Richmond, Fredericksburg & Potomac Railroad Company to the Petition Filed in the Above-entitled Proceeding.

For answer to said petition respondents say as follows:

I.

Respondents have no reason to doubt the correctness of the allegations contained in paragraph one of the petition.

II.

The correctness of the allegations contained in paragraph two of the petition is admitted.

III.

Respondents ask that reference may be made to the lawfully published tariffs for the purpose of determining the correctness of the allegation contained in paragraph three of the petition.

54 IV.

Respondents ask that reference may be made to the lawfully published tariffs for the purpose of determining the correctness of the allegations contained in paragraph four of the petition.

V.

Respondent asks that reference may be made to the lawfully published tariffs for the purpose of determining the correctness of the allegations contained in paragraph five of the petition.

VI.

Respondents deny the correctness of each and every allegation contained in paragraph six of the petition.

Accordingly respondents deny that complainant's members, or any of them, are entitled to reparation, or any other relief, or that respondents, or any of them, should be subjected to any adverse order whatever.

And having fully answered, respondents pray to be hence dismissed, etc.

R. WALTON MOORE,
Special Counsel.

55 EXHIBIT E.

(References in margin are to volume and pages of report as issued.)

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY et al.

Upon complaint that the defendants unduly discriminate against receivers of freight at Richmond, Va., by performing switching service on interstate carload freight without charge for one and refusing to perform a like service for another where the service is performed under like circumstances and conditions, and that they unduly discriminate against receivers and shippers of freight at Richmond by refusing to absorb switching charges on interstate carload freight from connecting lines in that city, while at the same time no charge is made for similar switching service at Norfolk, Va., and other points. Held, That—

1. In cases where the traffic moves from the same points of origin and switching charge is absorbed in the one case and not in the other there is a violation of section 2 of the act, as the existence of competition in the one case and not in the other clearly does not constitute a substantial dissimilarity of circumstances and condiitons. Even, however, in the case of traffic which moves from different points and where section 3 alone may apply the competitive conditions relied upon are not sufficient to constitute a substantial dissimilarity of circumstances and conditions within the meaning of that section.

56 (30 I C. C., 552.)

2. The imposition of switching charges on interstate carload freight at Richmond while at the same time no charge of a like character is imposed at Norfolk on similar traffic constitutes undue discrimination against receivers and shippers of freight at the former point, which the defendants will be required to remove.

3. Complaint with respect to unreasonable and discriminatory charges on trap, peddler, and station-order cars not sustained.

William A. Glasgow, Jr., and Charles D. Drayton for complainant.
Merrel P. Callaway and Frank W. Gwathmey for Seaboard Air Line Railway; Atlantic Coast Line Railroad Company; Southern Railway Company, and Richmond, Fredericksburg & Potomac Railroad Company.

Report of the Commission.

McCHORD, *Commissioner:*

The complaint in this case is directed against the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, and the Southern Railway Company, all of which, on November 6, 1909, ceased their indiscriminate absorption of connecting-line switching charges on carload traffic at Richmond, Va., and provided that thereafter such switching charges would be absorbed only when the carrier performing the transportation service was in competition for the traffic with the switching line. The discontinuance of the absorption of connecting-line switching on trap, peddler, and station-order cars, hereinafter defined, and the making of a charge for the switching service when from industries on the line of the carrier performing the road haul, is also challenged. The resulting increased transportation charges are alleged to be unreasonable and to unduly discriminate between shippers in Richmond and against Richmond shippers as compared with shippers at Norfolk, Va., Memphis,
57 Tenn., Louisville, Ky., Cincinnati, Ohio, and St. Louis, Mo., where different practices are said to obtain. It is further asserted that the cancellation of through routes and reasonable rates applicable thereto has thus been effected, and we are asked to restore such through routes and reasonable rates.

The Chesapeake & Ohio Railway Company and the Richmond, Fredericksburg & Potomac Railroad are made parties defendant, presumably because of the prayer for through routes. These carriers pursue an entirely different policy from the southern lines and absorb connecting-line switching on all carload traffic from and to other than local points on their respective lines. It is the restoration or adoption of the same policy by the southern carriers that complainants seek.

The evolution through which the Richmond switching business has passed during the last several years presents a variety of practices differing frequently with each carrier. The principles employed, however, resolve themselves into two general divisions, the trunk line and the southern; the former is followed by the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac, and the latter by the Southern, Seaboard Air Line, and Atlantic Coast Line, which may be collectively referred to as the southern lines. The theory common to both principles is that connecting-line switching will be absorbed on competitive traffic, but the diversity of practices has been and is due to the sundry interpretations given the word "com-

petitive." Many years ago the Chesapeake & Ohio absorbed connecting-line switching only when it competed with the switching line, but for a long time its practice has been to make the absorption on all traffic to or from other than local points on its own line, local points being defined to be points not reached by two or more lines. It is not necessary that the second line upon which the point of origin or destination is located be an actual or (554) possible competitor with the Chesapeake & Ohio; the physical fact that the point is served from any direction by another road renders it competitive according to this de-
58 fendant's interpretation. At one time or another a similar interpretation was adopted, if not approved, by the other defendants which at periods acted even more liberally and absorbed switching to their local stations. The history of their dissensions indicates that there was a strong contention by one or more of these defendants for a more restricted application of the competitive theory. The Southern Railway has been a most persistent and consistent advocate of the more narrow construction, and in November, 1909, all of the southern lines took the position that in the absence of compelling competition with the switching road they would not absorb the switching charge. The Seaboard Air Line, always the most liberal of the southern carriers in its practice of absorption, on October 1, 1910, rescinded its action of November, 1909, and absorbed switching to or from other than local points until January 20, 1911, when it returned to the ranks of the other southern carriers. Carload shipments of fertilizer were originally included in the general restriction, but because of vigorous protests from the Richmond shippers the old practice of absorbing regardless of the competitive nature of the traffic was restored from March, 1910, to July of the same year. On intrastate shipments of fertilizer the absorption of switching charges is continued under an order of the Virginia Railroad Commission. Coal and coke have never been included in the non-absorption provisions. Another departure is created by the Atlantic Coast Line which protects the Richmond rates on traffic to and from six specified industries on its tracks because said industries were located under contract with this defendant guaranteeing to them the Richmond rates. It is admitted that this discrimination can not continue, and that it will be corrected as soon as this proceeding is concluded.

So far we have dealt only with carload traffic, but there is also involved such less-than-carload freight as moves in trap, peddler, and station-order cars, these being defined in defendants' tariffs as follows:

A trap is a car loaded with one or more less-than-carload ship-
ments at points on private or assigned sidings for distribution
59 at the railway freight warehouses into regular package or other cars for forwarding.

A peddler car is a car loaded with perishables for delivery at two or more destinations. It is generally loaded with freight requiring the protection of ice, and its purpose is to enable the movement of small lots of freight to several destinations without transfer.

A station-order car is a car loaded with miscellaneous less-than-carload freight for two or more destinations on the same local freight-train division. A station-order car differs from a trap car in that the purpose of the station-order car is to permit its being put in trains without rehandling at the railway's freight warehouse.

To accommodate any of these shipments an empty car must be placed at the industry having a private track or assigned (555) siding, there to be loaded with less than carload freight. In the case of peddler or station-order cars the car is switched directly to the yards of the carrier performing the line haul and there placed in the train without unloading or transfer. In the case of trap cars the car must be moved to the freight station of the line-haul carrier, where the freight is reloaded into cars for the proper destinations.

Generally speaking, prior to July 15, 1910, no additional charge was made for this service from industries on the line performing the transportation, and when from industries on connecting lines the switching of those lines was absorbed. For a short period the Southern Railway made a charge of $2 on trap cars from its own tracks or from its interchange. Since July 15, 1910, all of the southern roads make a charge of $2 from industries on their own rails. No charge is made from the interchange with connections and all connecting-line switching in excess of $2 per car is absorbed. This has the effect of placing all users of this service upon a parity, the aggregate charge to the shipper being always the Richmond rate plus $2. From October 1, 1910, to June 20, 1911, however, the Seaboard Air Line provided for the absorption of all connecting line switching on trap, peddler, and station-order cars containing 60 3,200 pounds or more of freight destined to competitive points; when containing less than 3,200 pounds, it absorbed all connecting-line switching in excess of $2, but the practice of the three roads is now substantially uniform. The charge made by the line carrier for switching to and from an industry on its own tracks presents an independent issue, and will be separately considered. For the present we shall treat only of the question of absorption when from connecting lines. It will be observed that as to this traffic absorption is made only of connecting-line charges to the extent that they are in excess of $2. The charges made by the switching lines vary from $2 to $3.50, dependent upon the location of the industry and the interchange tracks. It appears therefore that the absorption of the excess over $2 is made solely for the purpose of placing all industries on a parity. There is no provision that the traffic must be competitive, and to this extent the practice of the southern lines, so far as this service is concerned, is more liberal than that of the Chesapeake & Ohio or the Richmond, Fredericksburg & Potomac, neither of whom will absorb connecting-line switching on other than freight moving at carload rates, but will make no change for the service on 5,000 pounds or more of freight rated third class or higher, when moving via their lines. This is enough to portray the heterogenous practices in vogue at Richmond, all of which defendants admit and ask us to make some definite pronouncement that may be regarded as a criterion, to the end that uniformity, not only at Richmond, but elsewhere, may obtain. (556)

The practice of absorbing or refusing to absorb switching charges must be both reasonable and nondiscriminatory. Reserving the question of reasonableness for final consideration, we think the foregoing recital illustrative of much discrimination. A portion of connecting-line switching on trap and station-order cars and all of connecting-line switching on carload shipments of coal and coke are absorbed despite the nonexistence of the competition now made a condition precedent to the absorption of other carload switching.

On trap and station-order cars this absorption is voluntary;
61 on coal and coke, according to defendants, it is made because the Chesapeake & Ohio delivers coal from its West Virginia mines anywhere in Richmond at the Richmond rate. But under its broad definition of competition the Chesapeake & Ohio also delivers anywhere in Richmond at the Richmond rate considerable other carload traffic, and we do not see why its practice should exert a controlling influence only as to coal and coke. It is true that the nature of these commodities renders this traffic largely competitive commercially, but we do not think this justifies the discrimination, nor is this phase of competition embraced in the principle here advanced. Absorption is made on intrastate shipments of fertilizer because the railroad commission of Virginia has withheld its approval of the proposed nonabsorption of this traffic. Furthermore at Norfolk, Va., switching charges on traffic from the Norfolk and Portsmouth Belt Line are absorbed, although the belt line can not in any way be a competitor for the line haul. It is urged that the belt line, owned jointly by the carriers serving Norfolk and Portsmouth, is in reality but an extension of the terminals of each road, and that the switching charge paid the belt line by the line carriers is but their respective contributions to the maintenance of their joint property.

At Charleston, S. C., almost the same condition obtains with respect to the Charleston Terminal Company. At Louisville, Ky., the general rule, published in the tariff of the Southern Railway, is that connecting-line switching charges on carload traffic, trap and station-order cars, both competitive and noncompetitive, will be absorbed when the net revenue of the Southern is not less than $12 per car. This defendant explains that Louisville is practically in official classification territory, where the more liberal absorption rule prevails, and that its practice at Louisville is controlled by the practice of the carriers with whom it competes for Louisville traffic; that these lines do not take the same view of switching absorption as the Southern Railway, and that it can not be alone in the

enforcement of the restricted theory if it is to (557)
62 obtain business. The carriers at Louisville apply the trunk-line rule, while the southern lines at Richmond, after considerable controversy, have agreed upon a narrower view. At Memphis, Tenn., connecting line switching on trap and station-order cars to or from other than local stations on its Memphis division is absorbed by the Southern Railway because, it alleges, the business district at Memphis has gradually moved from its terminals and it must make this sacrifice to place itself on a competitive basis with the other lines.

In City Council of Atchison, Kans., vs. M. P. Ry. Co., 12 I. C. C. 111, the Commission held that the practice of defendants in granting certain allowances or free service in the elevation, transfer, mixing, cleaning, and other handling of grain at Kansas City, Mo., Argentine, Leavenworth, and Kansas City, Kans., which were withheld by them at Atchison, Kans., a point which took the same rates as the other points named, was unduly prejudicial to Atchison, and that the discrimination should be removed.

In Cattle Raisers' Asso. vs. C., B. & Q. R. R. Co., 12 I. C. C., 507, 515, the Commission said:

We held, in City Council of Atchison vs. M. P. Ry. Co., 12 I. C. C., 111, that where the defendants had for a long time treated certain Missouri River points as entitled to common rates and facilities and had thereby built up grain markets at these points, they must afford at one the same services in handling grain which they accord at others. Upon the same principle these carriers must not, in the absence of some justifying excuse, impose a terminal charge at Chicago, and not at other markets.

On principle the case under consideration is similar to Duncan & Co. vs. N. C. & St. L. Ry., 21 I. C. C., 186. In that case the Commission held that maintenance by defendants of transit privileges at Nashville, Tenn., while withholding such privileges from other southern cities was undue discrimination in favor of Nashville. The case is now before the Supreme Court, has been argued, and is awaiting decision.

63 No charge is imposed on the shipper or receiver of freight for switching at Norfolk. The carriers insist that the circumstances at Norfolk are different from those which exist at Richmond. We do not believe that because the carriers which serve Richmond own a belt line in Norfolk they are absolved from the obligation to impose their rates without undue discrimination against Richmond. It is a situation they are responsible for and one they can remedy.

If absorption practices are to be uniform, as defendants contend they should be, and if they are to be based upon a definite principle there is no reason why that principle should not be uniformly applied. At Richmond a certain theory is employed because the southern lines have agreed to employ it; at other cities an entirely different theory exists, not because of any difference in (53) the matter of carriage, but because such different theory best suits the carriers serving those points. In other words, the southern lines would apply the restricted theory wherever they can and would conform to a different practice at places whose policy they can not seriously influence.

At Richmond most of the competition experienced by the southern lines is with each other, little coming from either the Chesapeake & Ohio or the Richmond, Fredericksburg & Potomac. If, therefore, they intentionally or accidentally agree upon a uniform absorption practice, there is no other carrier competition to prevent its execution.

If it be true that absorption must be governed entirely by compe-

tive influences, it may well be argued that only that competition which is compelling should be recognized. All of these defendants contend that absorption is compelled when there is competition with the switching lines, but the southern carriers insist that this is the only competition which is compelling. If the shipment originate at a point common to all of the southern lines, destined to an industry in Richmond on the tracks of the Chesapeake & Ohio, the traffic is certainly competitive to Richmond, but because the Chesapeake & Ohio is not a competitor the switching charge of that line is not absorbed. In other words, such traffic ceases to be competitive upon its arrival at Richmond. If the same car were destined to an industry on the rails of the Seaboard Air Line, the switching charge of that carrier would be absorbed by the Atlantic Coast Line or the Southern Railway, and such industry would have an advantage over the Chesapeake & Ohio industry to the extent of the absorption. In the one case the shipper or consignee would pay only the Richmond rate; in the other, he would pay the Richmond rate plus the switching charge. The only justification offered for this advantage is that the Seaboard Air Line, Atlantic Coast Line, and Southern are rival roads, and that the transportation is therefore not performed under circumstances and conditions substantially similar to those attendant upon the transportation to the Chesapeake & Ohio industry. But the Supreme Court has said that "the phrase under substantially similar circumstances and conditions, as used in the second section, refers to the manner of carriage and does not include competition between rival roads." Wight vs. U. S., 167 U. S., 512; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144. In cases where the traffic moves from the same points of origin, and the switching charge is absorbed in the one case and not in the other, there is a violation of section 2, as the existence of competition in the one case and not in the other clearly does not constitute a substantial dissimilarity of circumstances and conditions. Even, however, in the case of traffic which moves from different points of origin, and where it may be that section 3 alone (559) applies, we do not think the competitive conditions relied upon are sufficient to constitute a substantial dissimilarity of circumstances and conditions within the meaning of that section. Traffic Bureau of Nashville vs. L. & N. R. R. Co., 28 I. C. C., 533.

It also follows, we think, that this absorption of switching charges at Norfolk by these defendants and their refusal to absorb switching charges at Richmond constitutes undue discrimination against the latter point in violation of section 3 of the act. It is well settled that if carriers absorb charges of any character for one shipper or refuse to absorb for others they must do the like for all others similarly situated and entitled to like treatment.

The Richmond rates have been in effect for a number of years without material change, and were substantially the same as at present when the absorption of switching was general and made without regard to competition. Prior to 1909 the Richmond rates may be said to have covered delivery anywhere in Richmond. While terminal charges were separately published by the switching lines

such charges were absorbed by the line carrier, which thereby hel itself out as a transporter of traffic to any point in Richmond at th Richmond rate.

No point is made, nor do we think one could be, that the switch ing line is not entitled to the compensation it receives, or that th charge for this service, considered independently, is unreasonable Neither is it shown that the line-haul rate to Richmond is unreason able, and upon this record we are unable to find that its combina tion with the switching charge constitutes an unreasonable rate This is not open to the objection that the carriers have attempted t separate their terminal charges by adding to the line-haul rate, be cause the switching charge has always been separately published, and it is only the refusal of the defendants to absorb the amount so pub lished that furnishes grounds for complaint.

If the aggregate of the rates for the line haul and for the termina service is reasonable, this Commission could not require absorption of terminal charges in the absence of a showing of unjust discrim ination.

In Railroad Commission of Nevada vs. S. P. Co., 21 I. C. C., 329 366, we said:

A community is entitled to something more than a reasonable rate; it is entitled to a non-discriminatory rate. The carrier may not say: "We will give to this community a reasonable rate," and meet the full requirements of the law; it must view its rates as a 66 whole and see to it that they effect no advantage or preference to one community over another which does not arise neces sarily out of the transportation advantages which the one has over the other.

We have found that the refusal of the defendants to absorb switch ing charges on some carload shipments at Richmond while absorb ing such charges on other carload shipments to and from that point is unjust discrimination against the shippers who are required to pay such charges, and also that the refusal of the defendants to ab sorb switching charges on some carload shipments at Rich- (560) mond while absorbing such charges on like shipments at Nor folk is unjust discrimination against Richmond and traffic transported to and from that point. The defendants will be required to cease and desist from such discrimination in the future.

Trap, peddler, and station-order cars are next to be considered Whether the service accorded the users of such cars constitutes an un due preference as against shippers of other less-than-carload freight is not an issue in this case, but requires some comment. The service is confined to shippers located on private or assigned sidings who load 10,000 or more pounds of less-than-carload freight rated lower than first class, or 5,000 or more pounds rated first class or higher We are not prepared to hold that by confining the use of these cars to private or assigned sidings defendants unjustly discriminate against shippers who may desire to use team tracks. It does not ap pear that anyone wishes to avail himself of this service on team tracks or that it would be to his advantage to do so. Neither are we informed as to the discrimination, if any exist, against a shipper who

has not the requisite tonnage. Until such questions are directly raised or the Commission is in possession of a more detailed account of these special services we shall express no opinion as to their discriminatory effect. The charge, almost uniformly $2, made for this service from industries on the tracks of the line carrier, is certainly not unreasonable as applied to trap cars, which must be hauled
67 to the carrier's freight shed, unloaded, assorted, and reloaded into cars for the respective destinations of the packages. Station-order cars and peddler cars, which are but station-order cars loaded with perishable freight, are designed to relieve the carrier of the expense of loading and of the warehouse congestion incident thereto. If these cars are moved from the industry directly to the assembling yards, the cost of handling the traffic is not so great as in the case of trap cars.

Specific data as to this saving were not submitted, and it might be that a charge reasonable for trap-car service would be unreasonable as applied to station-order or peddler cars. Again, on cars of this character, coming from connecting lines, the $2 charge accrues to the switching line, the carrier performing the line haul receiving only the regular less-than-carload rates, although it handles the trap car from its interchange to its warehouse and there incurs the expense incident to the transfer of the packages. Considered solely as a charge for an accessorial service, there is nothing upon which to predicate a finding of unreasonableness in the case of either (561) trap, peddler, or station-order cars, though as to the latter two this finding is without prejudice to any subsequent proceeding involving more specifically the distinction between the different services.

The absorption of any portion of the terminal road's charge for switching trap, peddler, or station-order cars is certainly at variance with defendants' theory of absorbing only because of compelling competition, and because of the different nature of the traffic and the different conditions under which it is hauled we are not prepared on this record to find that unjust discrimination as between carload and less-than-carload traffic results. Our opinion is that this portion of the complaint should be dismissed.

68 EXHIBIT F.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 8th Day of June, A. D. 1914.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY et al.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendants Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Southern Railway Company be, and they are hereby, notified and required to cease and desist, on or before September 1, 1914, and for a period of not less than two years thereafter to abstain from charging, demanding, collecting or receiving for switching interstate carload freight at Richmond, Va., any higher rates or charges than they contemporaneously charge, demand, collect, or receive from shippers and receivers of such carload freight for switching interstate carload freight at Norfolk, Va., such higher charges at Richmond having been found to be unduly discriminatory in said report of the Commission.

69 It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before September 1, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of not less than two years from said September 1, 1914, to maintain and apply to switching interstate carload freight at Richmond, Va., and to collect from shippers and receivers of such carload freight no higher charges than they contemporaneously maintain at Norfolk, Va., for similar service.

By the Commission:

[SEAL.] GEORGE B. McGINTY,
Secretary.

70 EXHIBIT G.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 31st Day of August, A. D. 1914.

James S. Harlan,
Judson C. Clements,
Edgar E. Clark,
Charles C. McChord,
Balthasar H. Meyer,
Henry C. Hall,
Winthrop M. Daniels,
Commissioners.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY et al.

Order Reopening Case.

Upon further consideration of the record in the above-entitled case, and for good cause shown,

It is ordered, That the order heretofore made in said case, dated June 8, 1914, and by its terms made effective September 1, 1914, and subsequently so modified as to become effective on October 1, 1914, be, and it is hereby, vacated and set aside.

It is further ordered, That this case be reopened for such further hearing or hearings as the Commission may hereafter direct.

By the Commission:

GEORGE B. McGINTY,
Secretary.

71 EXHIBIT H.

Interstate Commerce Commission.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY et al.

Submitted May 6, 1915. Decided April 28, 1917.

Upon rehearing in Richmond Chamber of Commerce vs. S. A. L. Ry., 30 I. C. C., 552, Held:

1. That the carriers' practice of uniformly absorbing switching charges on carload traffic to or from industries located on the Norfolk & Portsmouth Belt Line Railroad at Norfolk, while refusing to absorb switching charges on like traffic at Richmond, is not unduly preferential of Norfolk or unduly prejudicial to Richmond shippers.

2. That the practice of certain carriers serving Richmond of absorbing switching charges only when the switching line competes with the line-haul carrier, while refusing to absorb such charges when the switching line does not compete with the line-haul carrier, constitutes undue discrimination within section 2 of the act to regulate commerce when the switching service performed is substantially similar.

3. The original order modified in accordance with the findings of this supplemental report.

W. A. Glasgow, Jr., and C. D. Drayton for complainant.

F. W. Gwathmey, J. A. Moss, Jr., R. Walton Moore, and C. J. Rixey, Jr., for Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railroad Company.

W. S. Bronson for Chesapeake & Ohio Railway Company.

(44 I. C. C., 455).

72 *Report of the Commission upon Rehearing.*

DANIELS, *Commissioner:*

In the original report in this case, Richmond Chamber of Commerce vs. S. A. L. Ry., 30 I. C. C., 552, we found that—

the refusal of the defendants to absorb switching charges on some carload shipments at Richmond while absorbing such charges on other carload shipments to and from that point is unjust discrimina-

tion against the shippers who are required to pay such charges, and also that the refusal of the defendants to absorb switching charges on some carload shipments at Richmond while absorbing such charges on like shipments at Norfolk is unjust discrimination against Richmond and traffic transported to and from that point.

An order was issued against certain of the defendants therein, the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Southern Railway Company, whose lines reach both Norfolk, Va., and Richmond, Va., requiring them to cease and (456) desist, on or before September 1, 1914, from charging for the switching of carload freight at Richmond any higher rates than they contemporaneously charge shippers and receivers of such carload freight for switching interstate carload freight at Norfolk.

This order not fully reflecting our findings as above set forth, complainant requested a modification thereof as regards the alleged discrimination between shippers at Richmond. The three defendants to our original order having also filed a petition for rehearing, the Commission reopened the entire case for further consideration.

Neither at the original hearing nor upon rehearing were the rates in effect at Richmond or Norfolk alleged to be inherently unreasonable. Richmond shippers contend, however, that the Virginia cities, including Norfolk and Richmond, are generally on an in and out rate parity, and that for the carriers serving both Richmond
73 and Norfolk to absorb certain switching charges at Norfolk while refusing to absorb the switching charges on like traffic at Richmond puts the Richmond shipper at a substantial disadvantage, a disadvantage which is alleged to be unlawful. The point is also made that the present absorption practices in effect at Richmond unduly prefer certain of the shippers there located to the prejudice of other shippers at that point.

We are of the opinion upon further consideration that the discrimination alleged to exist by virtue of the diversity of absorption practices at Richmond and Norfolk is not unlawful. It appears on further hearing that the former record in this case did not fully explain the absorption practices in effect at Norfolk. In our original report we said, at page 557:

No charge is imposed on the shipper or receiver of freight for switching at Norfolk.

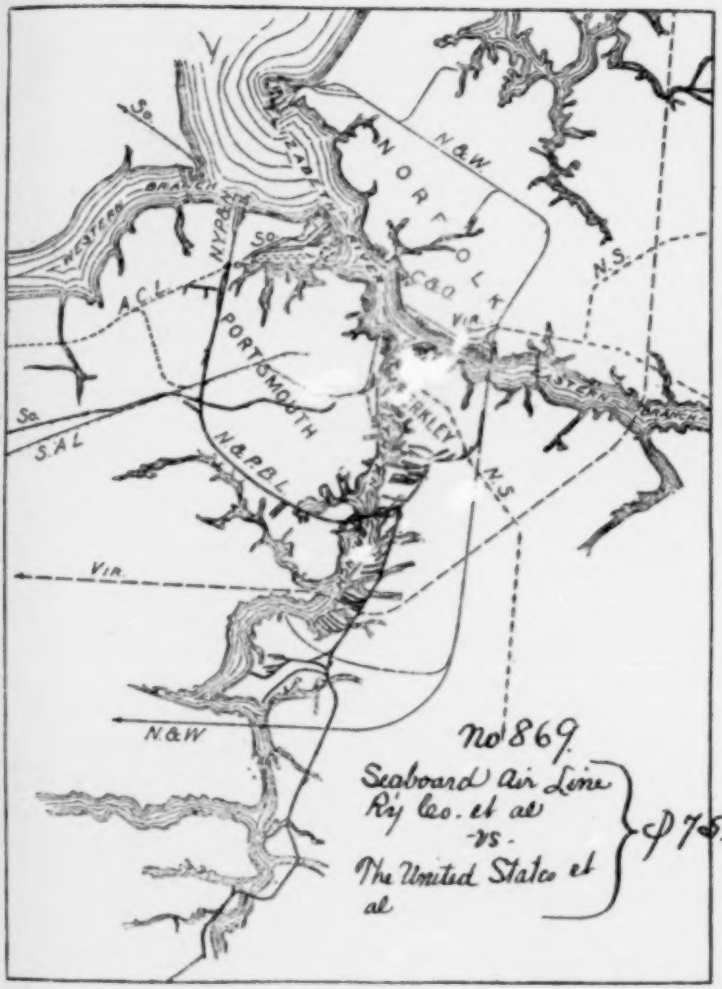
From the added evidence on the rehearing it now appears that this is true only with respect to those shippers located on the Norfolk & Portsmouth Belt Line Railroad Company, hereinafter called the belt line. The industries on the rails of other carriers, which include about three-fourths of the entire number, are subject to the same limited absorption practices as are in effect at Richmond. It is only those shippers at Norfolk located on the rails of the belt line who are alleged to be unduly preferred when compared with shippers at Richmond. Whether this general absorption of all switching charges to and from points on the belt line unduly discriminates against shippers at Norfolk located on other roads is not in issue in this case.

Prior to November 6, 1909, the three southern carriers (45
petitioners herein and hereinafter called the Coast Line, the
Seaboard, and the Southern, together with the Chesapeake & Oh
Railway Company and the Richmond, Fredericksburg & Potom
Railroad, absorbed all switching charges on carload traffic at Ric
mond to or from other than local points on their own line
74 local points being defined as those points not reached by tw
or more lines. Thereafter, however, by tariffs duly file
the Coast line, the Seaboard, and the Southern, while continui
to refuse to absorb the switching charges to and from local point
also refused to absorb the switching charges to and from comm
points unless the switching line was in competition for the traf
with the line-haul carrier. Coal and coke have never been includ
in the nonabsorption provisions. On traffic to industries situated
the Norfolk Belt Line, however, the defendant carriers have co
sistently absorbed the switching charges on carload traffic indiscri
inately whether to or from local or common points, other than
certain forest products originating at near-by Carolina produci
points.

In justification of this difference in the absorption practices
Norfolk and Richmond, petitioners allege that their relationsh
with the belt line at Norfolk is such that it is in substance a joi
terminal, and that by absorbing all switching charges to and fr
points thereon while refusing to similarly absorb switching charg
to and from industries located at Richmond, they do not discri
inate unduly against shippers at the latter point where there is n
belt line.

The accompanying map shows the geographical relation of N
folk and its adjoining suburbs. The Norfolk & Western and t
Virginian, operating in connection with the Norfolk Southern, al
enter Norfolk proper. Prior to the construction of the belt line, t
rails of the Coast Line, Seaboard, and Southern terminated at Por
mouth. Freight destined to Norfolk had to be ferried across t
Elizabeth River, unless it was moved back to Kirby, a junction poi
with the Norfolk & Western, which required an extra haul of ov
40 miles. To overcome this difficulty and in order that the sou
ern carriers, together with the New York, Philadelphia & Norfo
and the Chesapeake & Ohio, might more conveniently reach th
industries situated in Norfolk, the plan of constructing a belt li
was inaugurated. That belt line, as finally completed in 1898, e
tends from the junction point of the New York, Philadelph
75 & Norfolk and the tracks of the Norfolk & Carolina Railro
Company, now a part of the Coast Line, at Pinners Po
Va., around the southern edge of Portsmouth and across t

(Here follows diagram marked page 75.)



No 869.

Seaboard Air Line Ry Co. et al
-vs-
The United States et al

$ 75.

76 south branch of the Elizabeth River to a connection with the Norfolk & Western at Berkley, in all a distance of 5.8 miles. Subsequently the Elizabeth River Railroad extending south about 7 miles from a connection with the belt line in Berkley (458) became a branch of the belt line. The belt line, under a lease from the Southern Railway, also operates a spur 1.8 miles in length extending into the city of Portsmouth. Freight coming from or destined to industries in Norfolk proper over any of the southern routes now reaches Norfolk via the belt line and the Norfolk & Western bridge over the eastern branch of the Elizabeth River.

It is the view of petitioners that the property of the belt line is simply the joint property of the owning lines and that, therefore, each of such lines has an equal right of access to the in- (459) dustries located thereon, a right which makes such industries the terminals of each owning line. Complainant insists, however, that the belt line is a distinct corporate entity and that "the absorption of its switching charges by defendants operating at Norfolk, stands upon the same footing legally as though it were owned and operated independently of the defendants."

We are unable to take complainant's view of the matter. It may, of course, be true from a technical legal standpoint that a stockholder ordinarily has no interest in the property of the corporation in which he holds stock. But the control exercised by the owning lines over the belt line is such as to obliterate distinctions as to essential identity for operating purposes between the controlling companies and the belt line.

In determining whether this belt line constitutes a joint terminal, its early history and organization are significant. By act of the general assembly of Virginia, approved March 4, 1896, certain individuals were authorized to incorporate under the name of the "Southeastern & Atlantic Railroad Company," with authority to construct a railroad from any point on the line of the Norfolk & Carolina Railroad Company at Pinners Point to any point on the line of the Norfolk & Western between the eastern and south-
77 ern branches of the Elizabeth River. There was no construction whatever under this charter, but by contract dated July 7, 1897, the following eight railroad companies, the New York, Philadelphia & Norfolk Railroad Company, Seaboard & Roanoke Railroad Company, now a part of the Seaboard, the Norfolk Southern Railroad Company, the Norfolk & Western Railway Company, the Atlantic & Danville Railway Company, now a part of the Southern, the Norfolk and Carolina Railway Company, now a part of the Coast Line, the Southern Railway Company, and the Chesapeake & Ohio Railway Company, entered into a mutual agreement, the preamble of which recited that—

each of the companies above named desires to secure the construction of a belt-line railroad from Pinners Point, Va., to a connection with the Norfolk & Western Railway in Berkley, Va., for the mutual benefit of each in the interchange of business, and it is conceded to be for the best interest of all that the same should be constructed,

maintained, and operated under a separate organization in which all are to be equally interested and each to have an equal representation, and it has been decided to construct, maintain, and operate same under the charter of the Southeastern & Atlantic Railway Company.

Each of the contracting companies agreed to subscribe and pay for one-eighth of the capital stock, and each was to have one representative on the board of directors. By an act approved (460) January 12, 1898, the name of the corporation previously authorized was changed by the legislature of Virginia to the "Norfolk & Portsmouth Belt Line Railroad Company." The capital stock was fixed at not less than $20,000, and it was provided that the board of directors should consist of eight members. Shortly thereafter construction was begun and the belt line was completed and opened for business in 1898.

Not only from the act incorporating the original Southeastern & Atlantic Railroad Company and that changing its name to the Norfolk & Portsmouth Belt Line Railroad Company, but from
78 its physical contour and manner of operation as well, it appears that the belt line was constructed for belt-line purposes only, and in order that the eight carriers might thereby have rail connections into Norfolk proper. In view of these facts and of the exclusive control which the carriers exercise by virtue of their joint stock-ownership and equal representation on the board of directors, we are of the opinion and find that the belt line is a part of the line of each of the owning carriers for terminal purposes. It is of no consequence that the carriers do not directly own the belt line, but each merely its allotted share of the stock, nor that a charge of $1.50 is made in their respective tariffs for deliveries to industries located thereon. Each owning carrier contributes to the expenses of operation in the form of absorbing this switching charge, but it is simply a financial method of pro-rating the cost of the belt line's maintenance and operation. In substance it is nothing more or less than applying the line-haul rate to industries situated on the belt line, a practice which is not uncommon where the line-haul carrier owns the terminal severally. It is true that from time to time this joint ownership has undergone various changes, either by the sale of an interest to another carrier or through the consolidation of two or more of the original parties. At present there are seven joint owners of the stock, but in view of the relationship existing between the owning lines and the belt line, and since each owns a substantial interest in the belt line, we are of opinion and find that the industries located upon the belt line must be treated as situated on the joint terminals of all the owning lines. We therefore conclude that the practices of the Seaboard, the Southern, and the Coast Line of indiscriminately absorbing the switching charges on carload traffic to and from industries on the belt line at Norfolk, while refusing to absorb switching charges on like traffic to and from industries off their lines at Richmond, are not unduly prejudicial to the shippers at the latter point. L. & N. R. R. Co. vs. United States,

242 U. S., 60; Louisville Board of Trade vs. L. & N. R. R.
79 Co., 40 I. C. C., 679; Manufacturers Railway Co. vs.
St. L., I. M. & S. Ry. Co., 28 I. C. C., 93. In L. & N. (461)
R. R. Co. vs. United States, supra, the court said, in speaking of the legal effect of the joint ownership of the Nashville terminal by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, page 73:

If either carrier owned and used this terminal alone it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it; that is, to move a car to or from a final or starting point from or to a point of exchange. We conceive that what is true of one owner would be equally true of two joint owners.

What is true of a terminal owned jointly by two carriers we consider is also true where, as here, there are seven joint owners, since each owns a substantial interest in the belt line.

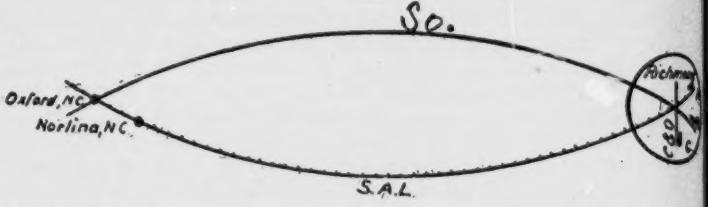
There are two instances, however, where the defendants fail to absorb the switching charges to industries on the belt line. On traffic destined to the Richmond Cedar Works, which is located at the end of the 7-mile branch running south from Berkley, and the only industry of importance on that branch, defendants' tariffs carry a switching charge of $2.50, of which the carriers absorb $1.50. Defendants also refuse to absorb the switching charges on certain forest products from near-by Carolina points destined to industries on the belt line on the ground that the revenue from this traffic is too thin to make such absorption possible. Neither point is directly in issue; but since in the first instance the industry is beyond what is commonly considered the Norfolk switching limits, the practice does not seem unreasonable or unduly discriminatory. Nor are there sufficient facts in this record for us to determine whether the refusal to absorb on forest products is unlawful.

It appears that it is the practice of the owning carriers at Norfolk to refuse to absorb the switching charges of the belt line on intermediate switching of noncompetitive traffic. The carriers will be expected to remedy this inconsistency.

80 Passing from the first issue considered, supra, we come to the consideration of the present practices of the petitioning carriers at Richmond, under which the switching charges to and from industries off their lines are absorbed only in the event that the switching line actually competes with the line-haul carrier for the traffic from and to common points.

It is a general rule among the carriers serving Richmond that switching charges will only be absorbed when compelled by competition. But the so-called trunk lines, as distinguished from the southern lines, give a different meaning to the term "competition." The Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac consider all traffic competitive "where two lines operate between different points regardless of the location of the in- (462) dustry"; that is to say, that traffic is competitive where a point is served by more than one line even though an industry at such point may be on the local terminals of but one of the carriers. The Coast Line, the Seaboard, and the Southern treat as competitive only

that traffic for which the switching line is in competition with the line-haul carrier. In other words, the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac absorb switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reaches the common point with its own rails, while the southern carriers will absorb the switch-



ing charges only on traffic to and from a community which the switching line actually reaches. This practice of the southern carriers is alleged to be unjustly discriminatory and unduly prejudicial under sections 2 and 3 of the act.

The three southern carriers seek to defend these absorp-
81 tion practices on the ground that the "competition" on traffic to and from an industry on a switching line which does not reach the common point is not sufficiently real to require equality of treatment in the matter of switching absorptions; that the location of an industry upon the rails of the carrier reaching the common point constitutes a substantially dissimilar circumstance within section 3; and that section 2 is inapplicable, since the service performed from the point of origin to an industry upon a competing line-haul carrier's rails is not "under substantially similar circumstances and conditions" to that performed in the transportation to an industry otherwise situated.

The precise point is best illustrated by a practical example. The accompanying diagram shows the situation. Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is a local point on the Seaboard. Assume that industries A, B, and C on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on (463) the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's switching charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry.

We do not consider that this practice is in violation of section 3. Under that section it is now well established that actual competition justifies a difference in rates. Industry C's unfavorable location on the rails of a carrier which does not reach the common point is a factor which prevents the Seaboard's refusal to absorb the switch-

ing charges on its traffic from amounting to undue prejudice within section 3. Further, it is not within the power of the Seaboard to equalize industry C's unfavorable industrial location. If, in the event of an order requiring that the undue prejudice be re-
82 moved, it chose to comply by refusing to absorb any switching charges whatsoever, industry B, located on the rails of a carrier which reaches Oxford, would still retain its commercial advantage. We have expressly said that there can be no undue prejudice within section 3, unless it is within the power of the carrier charged with the discrimination to do away with it by its own act. Ashland Fire Brick Co. vs. So. Ry. Co., 22 I. C. C., 115. At page 120 the Commission said:

The test of discrimination is the ability of one of the carriers participating in the two through routes from its two points of origin to the same point of destination to put an end to the discrimination by its own act.

The same principle was reaffirmed in Elevation Allowances at St. Louis and East St. Louis, 30 I. C. C., 696, 699.

But we are of the opinion that the present practices of the carriers serving Richmond are unlawful within section 2 of the act.

Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. This treatment, complainant argues, is similar to that condemned by the Supreme Court in Wight vs. United States, 167 U. S., 512.

Section 2 is primarily directed against discrimination be- (464)
tween shippers located in the same community. It is aimed to put all shippers within a switching district upon a sub-
83 stantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination," a discrimination which is prohibited and declared to be unlawful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment. Wight vs. United States, supra; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144, 146.

In the Wight Case, supra, it appeared that the Pittsburg, Cincinnati, Chicago & St. Louis Railway, hereinafter called the Pan Handle,

and the Baltimore & Ohio Railroad served both Cincinnati and Pittsburgh. The Pan Handle applied its flat Pittsburgh rate of 15 cents to the industry of one Bruening located upon an industrial siding on its line at Pittsburgh. The Baltimore & Ohio, also carrying a flat 15-cent rate to Pittsburgh, did not reach Bruening's brewery with its own rails, but in order to meet the Pan Handle's rate to Bruening it was accustomed to dray the traffic from its freight house to Bruening's brewery free of charge, subsequently arranging that Bruening should do the hauling, for which he was allowed 3½ cents per 100 pounds. One Wolf also operated a brewery at Pittsburgh but was not located upon the rails of any carrier and had to pay the full 15-cent Pittsburgh rate plus the drayage charge to get his shipments to his brewery, for the Baltimore & Ohio refused to make him any allowance. The Baltimore & Ohio was indicted and convicted for violation of section 2. The conviction was sustained by the Supreme Court of the United States on the ground that for the same services the Baltimore & Ohio charged 11½ cents to Bruening and 15 cents to Wolf, the 3½ cents' drayage allowance amounting to a rebate. The point was taken that Bruening was more favor-
84 ably situated than Wolf, since upon the rails of a carrier competing for the traffic, and hence was under substantially dissimilar circumstances. The court said, however, that "that phrase (under substantially similar circumstances and conditions) as found in section 2 refers to the matter of carriage and does not include competition." This principle was reaffirmed subsequently in I. C. C. vs. Alabama Midland Ry. Co., supra. At page 166 the Supreme Court said:

As we have shown in the recent case of Wight vs. United (465) States, 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.

We are of the opinion that the principles underlying the Wight case, supra, and the Alabama Midland case, supra, are controlling here. It was held in the Wight case, supra, that the fact of Bruening's location upon the rails of the Pan Handle did not justify the Baltimore & Ohio in treating him in a different manner than it did the complainant. If it was unlawful under section 2 for the Baltimore & Ohio to absorb the drayage charge on traffic over its line to Bruening's brewery, we consider that it would equally be unlawful for the Baltimore & Ohio to absorb the delivery charge were Bruening's goods, coming into Pittsburgh over the Baltimore & Ohio, switched to his industry over the rails of a subsequently constructed line or over the rails of the Pan Handle, while the Baltimore & Ohio at the same time refused to absorb the switching charges on complainant's traffic were he also now located upon a carrier's rails.

The movement from the interchange tracks of the Seaboard at Richmond to industry B or to industry C is simply a delivery

service. We are of the opinion that for the Seaboard to col-
85 lect the switching charges of the Chesapeake & Ohio to industry C, while absorbing the switching charges of the Southern to industry B, in effect is granting a rebate to the latter shipper and is unlawful within section 2—unlawful because the location of industry B on the Southern does not justify the Seaboard's difference in practice any more than the location of Bruening's brewery on the Pan Handle justified the Baltimore & Ohio's difference in practice. Just as in the Wight case, supra, the Baltimore & Ohio was hauling traffic from Cincinnati to Pittsburgh for Bruening at a lower charge than it hauled the same traffic in the same direction over the same rails for the complainant, so here on traffic from Oxford over the Seaboard, industry C is paying more for the same service over the same rails in the same direction than is industry B.

Petitioners attempted to distinguish the Wight case, supra, on the ground that the service performed for industry B and industry C is not "like" service within section 2. It is argued that were industry B and industry C not within the switching district of Richmond but 25 miles, respectively, from the interchange tracks of the Southern and the Seaboard, the service which the Seaboard performs on traffic from Oxford through Richmond to industry B would be a dissimilar service to that rendered on traffic to in- (466)
dustry C. They also argue that for precisely the same haul over the same rails, in the same direction, it has been held that the service rendered in moving import and domestic traffic is unlike service within section 2. Import Rate case, 162 U. S., 197; Pittsburgh Plate Glass Co. vs. P., C., C. & St. L. Ry. Co., 13 I. C. C., 89, 100.

We do not deny the soundness of these arguments, but where the industries are situated within the switching district of the same city and are substantially equidistant from the respective interchange tracks, we are of the opinion that the service which the line-haul carrier renders, whether the traffic is ultimately destined to industry B or industry C, is like service within section 2. It is the line-
86 haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.

The carrier's refusal to absorb the switching charges on traffic to and from strictly local points is justifiable. In such instances the transportation service is substantially dissimilar, for the movement is either over a different line or, if over the same line, for a substantially different line haul. If the carriers, in view of our conclusions herein, hereafter absorb the switching charge equally for all shippers on traffic to or from common points, while continuing to refuse to absorb the switching charges to or from strictly local points, it may result that the aggregate charges for the latter service will exceed those for the through service to or from the industries at Richmond. Although this might be considered a technical department from the

fourth section, the Commission in Conference Ruling 304, paragra
(*d*), and in Fourth Section Order No. 5 of March 20, 1911, has p
vided for this situation.

We do not consider that the carriers must absorb the switchi
charges indiscriminately to all industries within the switching lim
of Richmond if they choose to absorb the switching charges to a
one industry off their rails. The illegality herein found to exist
the receiving of a greater compensation for one service than fo
like service under substantially similar circumstances and condition
To take a concrete example and referring again to the diagra
Suppose industry C were 5 miles distant from the interchange trac
of the Seaboard, while industry B were only 2 miles distant. Su
pose the Chesapeake & Ohio's switching charge amounted to $
while that of the Southern was $2. If the Seaboard absorbed t
Southern's $2 switching charge on traffic to industry B, we do
not consider that it must absorb the entire $5 switch- (46
87 ing charge of the Chesapeake & Ohio on traffic
to industry C, but only to the extent to which the service
similar. In other words, it would probably be necessary for the Se
board to absorb $2 of the $5 charge of the Chesapeake & Ohio.

We are of the opinion, therefore, and find, that the practice
the southern lines of absorbing switching charges only when th
switching line actually competes with the line-haul carrier on traff
to or from industries at Richmond under substantially similar c
cumstances and conditions as defined in section 2 is unlawful.

On all coal and coke traffic from the West Virginia mines it
the general practice of all carriers at Richmond to absorb the switch
ing charges whether the coal originates at the same mine or differe
mines. This is justified on the ground that coal traffic is extremel
competitive; that the Chesapeake & Ohio, which serves its own mine
in West Virginia, applies the line-haul rate to its industries in Rich
mond; that the so-called southern carriers, who deliver coal at Rich
mond only in connection with the Norfolk & Western and the Vir
ginian railways, must absorb all switching charges on that traffic i
order to compete with the Chesapeake & Ohio coal. We do not de
cide whether this amounts to undue discrimination. It does not ap
pear that coal and coke are competitive with other traffic moving in
Richmond, and the absorption of switching charges upon certa
traffic and not upon other traffic is not in itself unduly discrimina
tory. Cattle Raisers' Asso. of Texas vs. F. W. & D. C. Ry. Co.,
I. C. C., 513.

In so far as the order in our original report conflicts with o
holdings herein, it will be modified and an appropriate order entere

HARLAN, *Commissioner*, concurring:

The Commission in the performance of its duties must in the fir
instance be guided by its own construction of the law that i
88 administers; but when any part of the act has been construe
by the court of last resort it must, of course, follow along th
path thus made for it. I am therefore readily able to concur in th
foregoing report, not only because that disposition of the case seem

necessarily to be required under the ruling of the Supreme Court of the United States in Wight vs. United States, 167 U. S., 512, but because the conclusions announced in it are sound and just in themselves.

The facts in the case before us are fully stated in the report of the Commission, and it will therefore suffice in this brief expression of my own views to point out that, as between the practice of the Southern Railway at Richmond and the practice of the Baltimore & Ohio described in the Wight case, there is no difference in (*a*) the character of the service, (*b*) the reason assigned for (468) the discrimination, or (*c*) the ultimate result both to the shipper and to the line-haul carrier. In each case is disclosed an effort by one line to overcome its disadvantage with respect to traffic of a competing line and secure it away from that line by an undertaking to make delivery at destination to a plant not on its own rails but on the rails of its competitor. To accomplish this result, the delivery service in each case is performed at the expense of the line operating under the disadvantage, thus making the cost to the consignee, for the line haul and delivery, no greater than it would have been if the competing line, with the plant on its own rails, had handled the traffic. The character and result of the service of the Southern at Richmond are therefore the same as the character and result of the Baltimore & Ohio's service in the Wight case. Moreover, the reason assigned by the Baltimore & Ohio for its discrimination in the Wight case was competition, and the Southern assigns the same reason here for its discrimination at Richmond.

It is true that in the Wight case the Baltimore & Ohio performed the service by the use of a horse and cart, while at Richmond
89 the same service, namely, the delivery of the traffic to the consignee's place of business from the rails of the carrier that has had the line haul, is performed for the latter by the locomotive and on the rails of a switching line. In each case, however, the same end was in view, namely, to secure the traffic away from a competing line. The only distinction between the two cases is in the facility employed for doing precisely the same thing. The question, then, seems to be, Is the thing done made lawful or unlawful according to the kind of facility used in doing it?

It is said that in the Wight case the rail transportation service performed for the two shippers by the Baltimore & Ohio "was identical," and that "it was over the same rails in the same direction"; that a proper application of section 2 was made by the court in that case is therefore conceded. But that section, it is urged, "does not apply to shippers over different routes or partly over the same route and partly over different routes"; and it is said that "the transportation service from Oxford to an industry on the Seaboard and the transportation from Oxford to an industry on the Chesapeake & Ohio are not like and contemporaneous." So far as the Southern Railway is concerned, its service from Oxford to Richmond is in the same direction over the same rails and is precisely "identical" for a delivery at Richmond to an industry on the Seaboard with a delivery at Richmond to an industry on the Chesapeake & Ohio.

With respect to industries on its own rails the seaboard is merely a switching line for the Southern when the latter has the line haul; the Chesapeake & Ohio, with respect to the industries (469) on its rails, bears exactly the same relation to the Southern. The suggestion that the transportation service from Oxford to a Seaboard industry is not like and contemporaneous with the service to a Chesapeake & Ohio industry therefore springs only from the fact that the Southern has joined with the Seaboard in making through rates from Oxford to each industry on the Seaboard's terminals at Richmond, while it has not joined, but on the contrary re-
90 fuses to join, with the Chesapeake & Ohio in making through rates from Oxford to industries on the rails of the latter in Richmond. The resulting difference in charges as between a Seaboard industry and a Chesapeake & Ohio industry is therefore a condition of the Southern's own creation. It has elected to join with one line and has elected not to join with the other, in establishing a through route and a joint through rate from Oxford to industries on their respective terminals at Richmond.

It justifies its election in the one case on the ground that, as to the Seaboard, the traffic is competitive, and it justifies its refusal in the other case on the ground that, as to the Chesapeake & Ohio, the traffic is not competitive. Precisely the same sort of competition was urged as an excuse for the discrimination which the court found to exist and condemned in the Wight case. In my judgment the discrimination arising out of a similar course by the Southern at Richmond is no less apparent and real, in its effect upon industries on the Chesapeake & Ohio's terminals, than was the discrimination in the Wight case as between two industries similarly situated so far as the rails of the Baltimore & Ohio were concerned. I repeat therefore that the conclusions reached in the majority report herein seem necessarily to flow from the principles announced in that case. As I have understood it, the court there lays down the broad general doctrine that, as between two shippers at the same rate point, competition between carriers does not excuse or justify a discrimination of the character condemned as unlawful under section 2 of the act. And a careful reading of the case seems not to permit of the suggestion that the court would have reached just the opposite conclusion if, instead of a horse and cart, the Baltimore & Ohio had hired a switching line to deliver the traffic to the industry on the rails of its competitor, and had thus accomplished, merely by the use of different facilities, precisely the same discrimination which, in the case under discussion, was declared to be unlawful.

91 In Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S., 144, a fourth section question was raised and the case deals with discriminations as between communities and not as between shippers in the same community. Unless each industry at Richmond is to be regarded as a community in itself—and that seems to be the suggestion made—the case af- (470) fords no support for any ruling here other than that made in the majority report.

While the conclusions now announced may affect conditions exist-

ing, more particularly, at the larger centers, it will not be revolutionary as intimated. The result can not fail to be wholesome and helpful in a large sense.

McCHORD, *Commissioner,* concurring:

I wish to limit my concurrence in the majority report to what I deem to be the only issue involved in this case, namely, the matter of unjust discrimination between shippers at Richmond growing out of the switching absorption rules of the defendants effective at that point. As indicated in the majority report, in our original report in this matter, Richmond Chamber of Commerce vs. S. A. L. Ry., 30 I. C. C., 552, at page 559 we said:

the refusal of the defendants to absorb switching charges on some carload shipments at Richmond while absorbing such charges on other carload shipments to and from that point is unjust discrimination against the shippers who are required to pay such charges, and also that the refusal of the defendants to absorb switching charges on some carload shipments at Richmond while absorbing such charges on like shipments at Norfolk is unjust discrimination against Richmond and traffic transported to and from that point.

The order entered upon that report was confined to requiring the defendants to cease the unjust discrimination as found against Richmond shippers growing out of the absorption of switching charges at Norfolk. For reasons not appearing of record and which
92 I need not add extraneously here, the order did not embrace a direction to remove the unjust discrimination found to exist between shippers located at Richmond.

Upon rehearing a more complete record was offered relating to the situation at Norfolk and it now appears that all shippers at Norfolk are not enjoying uniform treatment as concerns switching absorptions. Of course, the matter of the switching practices and rules of the carriers at Norfolk and their reasonableness as related to Norfolk shippers is not in issue in this case. This is recognized in the majority report. It says "whether this general absorption of all switching charges to and from points on the belt line unduly discriminates against shippers at Norfolk located on other roads is not in issue in this case." The majority report, however, engages in a lengthy consideration of the legal status of the Norfolk & Portsmouth Belt Line Railroad Company as related to the line-haul carriers which jointly own it and makes a finding that the absorption of the belt line's switching charge at Norfolk does not unduly discriminate against Richmond shippers where like (471) switching charges are not absorbed. The shippers at Norfolk who are not located on the belt line are in a position identical with that of the shippers in Richmond who are located on the rails of line-haul carriers whose switching charges are not absorbed by the defendants in this case. The finding of the majority report, therefore, is equivalent to a finding that the absorption of the belt line's switching charges at Norfolk is not unjustly discriminatory

against shippers not located on the belt line in Norfolk. The majority report consequently virtually prejudges any case which Norfolk shippers may hereafter institute against the switching practices of the carriers serving that point.

A discussion of the legal status of the Norfolk & Portsmouth Belt Line Railroad Company and a finding concerning the absorption of its switching charges is not necessary to the disposition of this case in view of the decision of the Commission with respect to the allegation of unjust discrimination between shippers at Rich-
93 mond. The majority report finds that the practice of certain carriers serving Richmond of absorbing switching charges only when the switching line competes with the line-haul carrier while refusing to absorb such charges when the switching line does not compete with the line-haul carrier constitutes undue discrimination. The order entered in this case simply requires the removal of the discrimination so found, and it might be stated that no other order could be entered on such a finding. The Commission, for instance, could not require the defendants to absorb the switching charges on all traffic. At most we can only require that the discrimination found to be unjust shall be removed.

The order entered in this case can be complied with by the defendants in either of two ways. The defendants can amend their tariffs canceling all absorptions now provided for on so-called competitive traffic at Richmond, or they can provide that the same absorption will be made on all traffic whether so-called competitive traffic or not, excepting only local traffic to or from points reached only by one of the defendants.

Manifestly if the defendants should comply with the order as latterly suggested no question as to discrimination against Richmond shippers in favor of Norfolk shippers would arise. It must result, therefore, that the allegations concerning unjust discrimination between Richmond and Norfolk which have been advanced in this case do not and can not become an issue to be decided by this Commission until the defendants have made their choice as to how they will comply with the order respecting the unjust discrimination found to exist between shippers located within the Richmond switching district.

I do not agree with the conclusions reached by the ma- (472)
jority report concerning the status of the Norfolk & Portsmouth Belt Line, nor with the view that the line-haul carriers can absorb the charges of this independently operated switching road without creating an unjust discrimination against shippers located in Norfolk on the rails of other line-haul carriers where the
94 switching charges are not absorbed. I do not think the Nashville Switching case, supra, is controlling of the situation at Norfolk. Because I deem these matters beside the issue in this case I will not further discuss these views on their merits.

I unhesitatingly agree with the majority report that the situation at Richmond is controlled by the Wight case, supra, and concur in the views of the report in this regard and the expressions in the

concurring opinion of Commissioner Harlan. No further elaboration is necessary to express my position on this phase of the case.

I do not find in the pleadings of this case any allegation which even remotely warrants the Commission in making any finding with respect to the absorption of switching charges on strictly local traffic such as the majority report undertakes to make. Whether or not the defendants' refusal to absorb switching charges on local traffic is justifiable would depend primarily upon what the practice of the defendant is in this regard at other points on their systems. This is not raised upon the record in this case and sufficient facts are not disclosed by the record to warrant a finding if the matter were in issue.

Likewise I do not concur in this further finding in the majority report as follows:

> We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails.

This finding is diametrically opposed to what we have found with regard to the situation at Richmond. All industries in the Richmond switching district must be accorded like treatment. Presumably the switching rate to and from all industries within the Richmond switching district will be the same. If there is a varying scale of switching rates the absorption should be uniform nevertheless.

The view expressed in the dissenting opinions that if the majority view with respect to the controlling influence of the
95 Wight case were followed out it would result that there would be a violation of section 2 of the act where a carrier accepts a less division on through traffic than its local rate for the same haul over the same line locally, is without point since it fails to take notice that section 2 is aimed only at the as- (473)
sessing of different charges against shippers similarly situated. If the carrier charges all shippers the same local rate and charges all shippers using the through route the same joint rate, there can be no violation of section 2 of the act no matter how the joint rate is divided as long as no shipper receives any concession from the respective rates. Certainly under no statement of the case could it be said that any difference between the local rate on the one hand or the division of the through rate on the other hand accrues as a refund to any shipper paying the joint rate.

It is my view that this case should be disposed of on the situation existing at Richmond proper without any discussion of incidental situations elsewhere which are extraneous to the issue here involved, and on this point I concur fully with the views as expressed in the majority opinion.

HALL, *Chairman*, dissenting:

I am constrained to dissent from so much of the majority report as finds the switching practices of the petitioners at Richmond unjustly discriminatory under section 2 of the act to regulate commerce.

The alleged discriminatory practices result from the rules observed by the petitioners in absorbing switching charges to or from industries off their respective lines. As stated in the majority report the switching policy of these lines is different from that of the other two defendants in this proceeding, the Chesapeake & Ohio Railway Company and the Richmond, Fredericksburg & Potomac Railroad Company. This may be illustrated as follows: Oxford, N. C., is a point reached by the Seaboard Air Line Railway and the Southern Railway, which compete for traffic from Oxford to Richmond. If the traffic moves by the Southern to Richmond
96 destined to an industry on the terminal tracks of the Seaboard Air Line Railway, the Southern will absorb the switching charge of the Seaboard Air Line in order to make delivery, but if the industry is located upon the terminal tracks of the Chesapeake & Ohio the Southern will not absorb the switching charge of the Chesapeake & Ohio in making delivery. Under similar circumstances the Chesapeake & Ohio or the Richmond, Fredericksburg & Potomac absorb the switching charge of the delivering line. In other words, they absorb switching charges even where the switching line is not the competitor. The defendants do not absorb switching charges to or from industries off their lines at Richmond when the traffic is from or to local points on their lines, for example, traffic moving from Norlina, N. C., via the Seaboard Air Line Railway, to an industry off the latter's rails at Richmond.

The majority report does not require the absorption of (474) switching charges on carload traffic to or from local points on the respective lines of the defendants, but it does require that when the line-haul carriers are in competition for the traffic to or from Richmond their absorption of the switching charges shall not be confined to traffic for which the switching line competes. That is, if, in the example above given, the Southern Railway absorbs the switching charge for the industry on the terminal tracks of the Seaboard Air Line, it must also absorb the switching charge for the industry located on the terminal tracks of the Chesapeake & Ohio. Unless this is done the majority find that the two industries are not upon an equality, since the Southern Railway pays for a delivery service to industries on the terminal tracks of the Seaboard Air Line and declines to pay for a delivery service to industries on the tracks of the Chesapeake & Ohio. This inequality of treatment, it is urged, is precisely the same as that condemned by the Supreme Court in the case of Wight vs. United States, 167 U. S. 512, hereinafter considered.

At this point the general practice of switching to industrial sidings should be stated. The rate on carload shipments to
97 points within the so-called "switching limits" to a city usually includes delivery at all industrial sidings reached by

the rails of the line-haul carrier. Associated Jobbers of Los Angeles vs. A., T. & S. F. Ry. Co., 18 I. C. C., 310. The special service thus accorded consignees owning industrial sidings has not been considered unlawfully discriminatory either as against those having no sidings or as against those having industries which are not reached by the rails of the line-haul carrier. To effect delivery to those latter industries the services of an additional carrier must be employed, and, as said in Ohio Iron & Metal Co. *vs.* C., M. & St. P. Ry. Co., 28 I. C. C., 703—

shippers desiring delivery on the rails of another carrier ordinarily must bear the additional reasonable switching or transfer charges incident to such delivery.

The same practice obtains in the reverse movement of shipments from the industrial sidings.

With this general practice in mind, I refer again to the example above given, i. e., traffic moving via the Southern from Oxford to an industry on the rails of the Seaboard Air Line at Richmond. Under normal conditions the total charge would be the line-haul rate of the Southern plus the switching charge of the Seaboard. The Seaboard, however, also serves Oxford, and its rate includes delivery at the industry upon its own rails at Richmond. To compete for this traffic, therefore, the Southern, the line-haul carrier, must shrink its share of the total charge by the amount of the Seaboard's switching charge. Again, in the case of (475) traffic moving via the Southern from Oxford to an industry upon the rails of the Chesapeake & Ohio at Richmond, the through charge via the Southern would naturally be the line-haul rate of the Southern plus the switching charge of the Chesapeake & Ohio. But as the line-haul rate of the Seaboard does not include delivery to an industry on the Chesapeake & Ohio, there is no necessity for the Southern to shrink its earnings in this case, and it does 98 not do so. It should be remarked that the practice of the Southern here illustrated of accepting smaller earnings on competitive traffic than on noncompetitive traffic is not uncommon.

In the case of Wight vs. United States, supra, which the majority consider decisive of the question under discussion, the Supreme Court held that the absorption of drayage charges for one shipper and the nonabsorption of drayage charges for another could not be justified upon the ground of competition. There was no question in that case but that the rail transportation service furnished the two shippers was identical. It was over the same rails in the same direction. It began at Cincinnati and ended at the depot of the Baltimore & Ohio Railroad at Pittsburg. As stated in the opinion of the court at page 517—

The service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred, the other, in fact, but 11½ cents. It is true he formerly paid 15 cents, but he received a rebate of 3½ cents,

and regard must always be had to the substance and not to the form.

It is apparent that in relying upon the Wight case the majority assume that the transportation service here in issue terminates upon the rails of the line-haul carrier instead of upon the rails of the delivering line. In other words, the majority assimilate the switching movement to a drayage movement from the rails of the line-haul carrier to the offline industry. But if this reasoning is sound the case cited would require that we find all switching absorptions unlawfully discriminatory on the theory that shippers having sidings thereby receive a drayage service not accorded to shippers who have no sidings. The majority, however, do not announce their adhesion to this view.

It is clear that the transportation service in issue does not end until the property transported is delivered at the offline industry. It is also clear that the movement to this destination is a through all-rail movement from the point of origin. Both in the case of
99 traffic moving from Oxford via the Southern to an industry on the Seaboard and in the case of traffic moving from the same point via the same line to an industry on the Chesapeake & Ohio the service of two carriers is required. It is true that the total charge paid by the industry on the Chesapeake & Ohio is greater by the amount of that carrier's switching charge than the charge paid by the industry on the Seaboard. But the trans- (476)
portation service from Oxford to an industry on the Seaboard and the transportation service from Oxford to an industry on the Chesapeake & Ohio are not "like and contemporaneous." The difference in the through charges for these two distinct services results from competition in the one case with the single-line rate. While competition will not justify a difference in charge for identical transportation services (see the Wight case), this Commission has never held that the acceptance of different divisions for identical transportation hauls constitutes a violation of section 2. Since the service of the line-haul carrier is only a segment of the through haul its share of the through charges is in effect a division. If we lay down the rule in this case that carriers can not demand or receive different divisions for identical transportation hauls, where are we to draw the line?

The unjust discrimination prohibited by section 2 is restricted to the case of shippers over the same road or roads, and does not apply to shippers over different roads, or partly over the same road and partly over different roads.

From Oxford to the industry on the Seaboard the movement is over two roads, the Southern and the Seaboard; to the industry on the Chesapeake & Ohio the movement is over the same line-haul road, the Southern, and partly over another road, the Chesapeake & Ohio. The line-haul movement from Oxford is identical only if both delivering carriers have the same junction with the line-haul carrier.

One further point should be noted. The cause of the disadvantage which the majority seek to remove is not the switching absorption, but the extension of the line-haul rate to cover delivery to

the industry on the rails of a line-haul carrier. The ma-
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I may add that I fully concur in the views expressed by Commis-
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LARK, *Commissioner,* dissenting:

I agree to the views of the majority with regard to the (477)
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In the illustration given in the majority report a person shipping
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in the Wight case by saying:

As we have shown in the recent case of Wight *vs.* United States,
167 U. S., 512, the purpose of the second section is to enforce
equality between shippers over the same line, and to prohibit any
rebate or other device by which two shippers shipping over the same
line, the same distance, under the same circumstances of carriage,
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and regard must always be had to the substance and not to the form.

It is apparent that in relying upon the Wight case the majority assume that the transportation service here in issue terminates upon the rails of the line-haul carrier instead of upon the rails of the delivering line. In other words, the majority assimilate the switching movement to a drayage movement from the rails of the line-haul carrier to the offline industry. But if this reasoning is sound the case cited would require that we find all switching absorptions unlawfully discriminatory on the theory that shippers having sidings thereby receive a drayage service not accorded to shippers who have no sidings. The majority, however, do not announce their adhesion to this view.

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equality between shippers over the same line, and to prohibit any
rebate or other device by which two shippers shipping over the same
line, the same distance, under the same circumstances of carriage,
are compelled to pay different prices therefor; and we there held
that the phrase "under substantially similar circumstances and con-

ditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the critisism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legiti- (478) mate bearing on the situation—among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into
102 consideration.

While condemning all discriminations that are unjust and all preferences and prejudices that are undue, the manifest purpose of the Congress in this legislation was to promote and encourage free, fair, and open competition between carriers. The Commission is authorized to prescribe only the reasonable maximum charge which the carrier may assess. The carrier may charge less than that reasonable maximum if it chooses to do so. This Commission has frequently said that in meeting competition a carrier may, by its election do many things which it could not be required against its will to do. For many years it has been a general custom for carriers by railroad to secure the road haul on traffic which could be hauled by another carrier through payment or absorption of the switching charges necessary to be paid in order to have the traffic switched for it by another carrier at point of origin or of destination. There has been no secret about this practice; it is and for many years has been practically universal, and is and has been provided for in the carriers' tariffs. The practice was general before the Wight case was decided and has been equally general ever since that time, and it has not until now been suggested that it involved or constituted violation of section 2 of the act.

In T. & P. Ry. vs. I. C. C., 162 U. S., 197, 219, the Supreme Court of the United States said:

Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote

and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

This expression was quoted with approval by the (479)
103 same court in S. P. Co. vs. I. C. C., 200 U. S., 536, 522.

In Transit case, 24 I. C. C., 340, 350, this Commission said:

The act is an aid, not a hindrance, to commerce, and must be given such reasonable construction as makes to that end.

The interpretation of section 2 by the majority in the instant case will, in actual practice and in a practical way, be nothing less than revolutionary.

Of course, the purposes, principles, and substantive provisions of the act must be preserved, guarded, and observed. At the same time the fact should be recognized that we are dealing with a very practical question which involves the operation and efficiency of an industry stupendous in magnitude and vital to the welfare and the life of commerce and industry in our nation. If A ships from Oxford via the Southern Railway to point B in Richmond and B ships from Oxford via the Seabord Air Line to point B in Richmond and under public tariffs they pay exactly the same sums for the services rendered, there is open and fair competition between the Southern and the Seaboard Air Line for the competitive traffic. It is of no public concern that one of these carriers employs the other to perform for it a part of the services. The principle is the same as that which underlies a joint through rate. The only difference is in the manner of publishing the rate.

It seems not inappropriate to note where the decision of the majority logically, aye, inevitably leads. If it is a violation of section 2 for the Southern Railway to charge a shipper the same sum for transporting each of two cars from Oxford, one delivered at point A and one at point B in Richmond, and to pay the Seaboard Air Line for switching the car to point A, thus retaining somewhat less net earnings on the car delivered at A than on the car delivered at B, it follows that it is also a violation of section 2 for a carrier to accept for an identical service on its own line different compensation in the form of local rates and divisions of joint rates on
104 traffic of the same character coming from different points of origin or destined to different points. Every carrier of importance has its local rates applicable between the termini of its own line. It joins with other carriers in joint through rates from and to points beyond its own line, of which it receives agreed upon

divisions which are generally less than its local rates and which var according to points of origin and destination, although it hauls the different shipments of the same commodity between the same point on its own line and in the same train. If this is a violation of se tion 2, then all joint rates are unlawful, unless they are made b combining the full local rates of the carriers participating therein.

It must also follow that proportional rates less than local rates for the same haul on a given carrier's line are in viola- (480) tion of section 2, and yet in the recent enacted Panama Canal Act the Congress specifically authorized the Commission to prescrib proportional rates, and defined proportional rates as "those which differ from the corresponding local rates."

It is well established that whenever it is possible to do so a legisla tive act should be construed in such way as to give effect to all o its provisions. Section 4 of the act prohibits charging a greate compensation for a shorter than for a longer distance over the same line or route in the same direction where the shorter haul is included within the longer, except when and to the extent that the Commis sion, after investigation, permits the charging of less for the longe than for the shorter distance. If the fact that in the instant ca the carrier retains less revenue on one shipment than it does o another constitutes violation of section 2, the application of that principle to instances in which a carrier performs the same service on two shipments, as to one of which it earns or retains lower revenue than on the other, would invalidate relief granted by the Commission under section 4 and nullify the manifest intent of that section, in which the Commission is specifically authorized to grant relief.

I am authorized to say that Commissioner Clements concurs in these views.

105 EXHIBIT I.

Order.

At a General Session of the Interstate Commerce Commission Held at its Office in Washington, D. C., on the 28th day of April, A. D. 1917.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY, ATLANTIC COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY.

This case coming on for further hearing upon petition for rehear ing by certain of the defendants therein, the Seaboard Air Line Rail

way, Atlantic Coast Line Railroad Company, and Southern Railway Company, and having been further heard and submitted, and the Commission having, on the date hereof, made and filed a report upon the rehearing, containing its findings of fact and conclusions thereon, which said report, together with the original report made and filed as of June 8, 1914, are hereby referred to and made a part hereof:

It is ordered, That the order previously entered in this proceeding on June 8, 1914, be, and it is hereby, canceled and set aside as of this date.

It is further ordered, That defendants Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Southern
106 Railway Company be, and they are hereby, notified and required to cease and desist, on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interestate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in said supplemental report to be unjustly discriminatory and unlawful within section 2 of the act to regulate commerce.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before August 1, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply uniform regulations and practices for the absorption of charges for the switching of interstate carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

107 EXHIBIT J.

Order.

At a General Session of the Interstate Commerce Commission, he at its Office in Washington, D. C., on the 25th day of June, A. 1917.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY ET AL.

Upon further consideration of the record in the above-entitl proceeding, and good cause appearing therefor,

It is ordered, That the order entered in this proceeding on Ap 28, 1917, which was by its terms made effective August 1, 1 be, and it is hereby, modified so that it will become effective on N vember 1, 1917, instead of on said August 1, 1917; but in all oth respects the said order of April 28, 1917, shall remain in full fo and effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

108 EXHIBIT K.

Order.

At a General Session of the Interstate Commerce Commission, H at its Office in Washington, D. C., on the 29th Day of Septemb A. D. 1917.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY ET AL.

Upon further consideration of the record in the above-entit proceeding, and good cause appearing therefor,

It is ordered, That the order entered in this proceeding on Ap 28, 1917, and by its terms made effective August 1, 1917, s sequently modified to become effective on November 1, 1917, be, it is hereby, further modified so as to become effective on Dec ber 1, 1917, instead of on said November 1, 1917; but in all ot

respects the said order of April 28, 1917, shall remain in full force and effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

109 EXHIBIT L.

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 20th Day of October, A. D. 1917.

No. 4611.

RICHMOND CHAMBER OF COMMERCE

vs.

SEABOARD AIR LINE RAILWAY ET AL.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor,

It is ordered, That the order entered in this proceeding on April 28, 1917, and by its terms made effective August 1, 1917, subsequently modified to become effective on December 1, 1917, be, and it is hereby further modified so as to become effective on January 1, 1918, instead of on said December 1, 1917, but in all other respects the said order of April 28, 1917, shall remain in full force and effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

110 *Memorandum as to Process.*

Filed November 6th, 1917.

To the clerk of said Court:

Please issue subpœnas in the above-entitled proceeding and serve same, together with a copy of the petition and exhibits herein, upon the Attorney General of the United States and the Secretary of the Interstate Commerce Commission, and let the Marshal's return show that the service has been made as aforesaid, and that a copy of said petition and exhibits has been filed with and delivered to the Department of Justice through the Attorney General, and the Interstate Commerce Commission through the Secretary.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Chancery Subpœna.

UNITED STATES OF AMERICA,
Eastern District of Virginia,
Richmond Division, ss:

The President of the United States of America to the United State of America and The Interstate Commerce Commission, Washington, D. C., Greeting:

You are hereby commanded and strictly enjoined to be and ap-
pear in the District Court of the United States for the Eastern Dis-
trict of Virginia, at Richmond, within the time specified in
111 the Memorandum below, to answer or otherwise defend a cer-
tain petition filed in said Court against you by the Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company, corporations, seeking an injunction, &c., against certain orders of the Interstate Commerce Commission, and to do further and receive what the said District Court shall consider in that behalf. And this you are in no wise to omit, under the pains and penalties of what may befall therein.

Witness, the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, at Richmond, Virginia, this sixth day of November, in the year of our Lord one thousand nine hundred and seventeen, and of our Independence the 142nd year.

[SEAL OF COURT.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

Memorandum.

The said defendants are required to file their answer or other defense in the clerk's office of said court on or before the thirtieth day after service of this writ and copy of the petition.

JOSEPH P. BRADY,
Clerk United States District Court.

Marshal's Return.

UNITED STATES OF AMERICA,
District of Columbia:

I hereby certify that I received the within writ of subpœna at
Washington, in the District of Columbia, on the 7th day of
112 November, 1917, and made service thereof at the City of
Washington, in the District of Columbia, on the 7th day of November, 1917, by delivering a copy thereof personally to Thomas W. Gregory, Attorney General of the United States of America

and to the Interstate Commerce Commission by service on George B. McGinty, Secretary of said Commission, and filed with and delivered to the Department of Justice through the Attorney General, and the Interstate Commerce Commission through its Secretary, at Washington, D. C., printed copies of the Petition and Exhibits "A" to "L", inclusive, thereto, as filed with the Clerk of the United States District Court at Richmond, Virginia.

MAURICE SPLAIN,
Marshal.

Application for Interlocutory Injunction and Temporary Restraining Order.

Filed November 6th, 1917.

Come now the petitioners, Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company, by counsel, and upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Eastern District of Virginia, and the Judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction, suspending and restraining the enforcement, operation and execution of the orders of the Interstate Commerce Commission referred to in the petition herein, being the order entered on April 28, 1917, and certain orders amendatory thereof as to the effective date, in the proceeding lately pending before said Commission, Docketed as No. 4611, and
113 entitled Richmond Chamber of Commerce vs. Seaboard Air Line Railway et al., involving switching absorption practices at the City of Richmond, Virginia; and also to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said orders of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days' notice of said hearing may be given to the Attorney General of the United States and to the Interstate Commerce Commission, as provided by law.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Order Setting Down for Hearing Application for Interlocutory Injunction and Temporary Restraining Order.

Entered and Filed November 6th, 1917.

This case came on to be heard on the 6th day of November, 1917, before the Court upon Petitioners' application for an interlocutory injunction and temporary restraining order as follows:

Come now the petitioners, Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company, by counsel, and upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Eastern District of
114 Virginia, and the Judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction, suspending and restraining the enforcement, operation and execution of the orders of the Interstate Commerce Commission referred to in the petition herein, being the order entered on April 28, 1917, and certain orders amendatory thereof as to the effective date, in the proceeding lately pending before said Commission, Docketed as No. 4611, and entitled Richmond Chamber of Commerce vs. Seaboard Air Line Railway et al., involving switching absorption practices at the City of Richmond, Virginia; and also to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said orders of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days notice of said hearing may be given to the Attorney General of the United States and to the Interstate Commerce Commission, as provided by law.

Upon consideration thereof the Court is pleased to order and decree that the said application for a restraining order and the said application for an interlocutory injunction will be heard before the Judge of this Court and two other Judges whom he may call to his assistance, in accordance with the statute in such case made and provided, in the Federal Building, in Richmond, Va., on Saturday, the 17th day of November, 1917, at 10:30 o'clock, a. m., provided that notice of such hearing shall have been given, as required by law.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Richmond, Va., November 6", 1917.

115 *Order Calling to Assistance the Honorables Jeter C. Pritchard and Charles A. Woods, United States Circuit Judges for the Fourth Circuit, to Hear and Determine Application for Interlocutory Injunction and Temporary Restraining Order.*

Entered and Filed November 6th, 1917.

In the above entitled cause, now pending in this court, application having been made to me, the District Judge for the said Eastern District of Virginia, to issue in this suit to continue during its pendency an interlocutory injunction, suspending and restraining the enforcement, operation and execution of certain orders of the Interstate Commerce Commission, I do hereby, in accordance with the provisions of an Act approved October 22nd, 1913 (38 Stat.

Chap. 32), being an Act to abolish the Commerce Court, and for other purposes, call to my assistance, to hear and determine said application, the two circuit judges of the Fourth Judicial Circuit, Honorables Jeter C. Pritchard and Charles A. Woods, and do hereby also designate Saturday, the 17th day of November, 1917, as the time for hearing of the same at Richmond, Virginia.

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Va., Nov. 6", 1917.

Notice of Hearing of Application for Interlocutory Injunction and Temporary Restraining Order.

Filed November 14th, 1917.

116 The United States of America, through the Attorney General of the United States, and the Interstate Commerce Commission are hereby notified that on Saturday, November 17th, 1917, at the hour of 10:30 o'clock, a. m., in the Federal Building in Richmond, Virginia, a hearing will be held of petitioners' application to the United States District Court for the Eastern District of Virginia, and the judges thereof, to grant and issue in this suit to continue during its pendency an interlocutory injunction suspending and enjoining the enforcement, operation and execution of the orders of the Interstate Commerce Commission referred to in the petition herein, being the order entered on April 28, 1917, and certain orders amendatory thereof as to the effective date, in the proceeding lately pending before said Commission, docketed as No. 4611, and entitled Richmond Chamber of Commerce vs. Seaboard Air Line Railway et al., involving switching absorption practices at the City of Richmond, Virginia; and, furthermore, to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said orders of the Interstate Commerce Commission pending the application for said interlocutory injunction.

This notice is given pursuant to law and to the requirement of the following order of the said Court entered herein on November 6th, 1917, to-wit:

United States District Court, Eastern District of Virginia.

SEABOARD AIR LINE RAILWAY COMPANY, ET AL., Petitioners,

vs.

UNITED STATES OF AMERICA, Defendant.

Order.

117 This case came on to be heard on the 6th day of November, 1917, before the Court upon Petitioner's application for an

interlocutory injunction and temporary restraining order as follows:

Come now the petitioners, Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company, by counsel, and upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Eastern District of Virginia, and the Judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction, suspending and restraining the enforcement, operation and execution of the orders of the Interstate Commerce Commission referred to in the petition herein, being the order entered on April 28, 1917, and certain orders amendatory thereof as to the effective date, in the proceeding lately pending before said Commission, docketed as No. 4611, and entitled Richmond Chamber of Commerce vs. Seaboard Air Line Railway et al., involving switching absorption practices at the City of Richmond, Virginia; and also to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said orders of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days' notice of said hearing may be given to the Attorney General of the United States and to the Interstate Commerce Commission, as provided by law.

Upon consideration thereof the Court is pleased to order and decree that the said application for a restraining order and the said application for an interlocutory injunction will be heard before the Judge of this Court and two other Judges whom he may call to his assistance, in accordance with the statute in such case made and provided, in the Federal Building, in Richmond, Va., on Saturday, the 17th day of November, 1917, at 10:30 o'clock, a. m., provided that notice of such hearings shall have been given, as required by law.

118

Dated Nov. 6th, 1917.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Marshal's Return on Notice.

UNITED STATES OF AMERICA,
District of Columbia:

I hereby certify that I received the within notice at Washington, in the District of Columbia, on the 7th day of November, 1917, and made service thereof at the city of Washington, in the District of Columbia, on the 7th day of November, 1917, by delivering a copy thereof personally to Thomas W. Gregory, Attorney General of the

United States, and to the Interstate Commerce Commission by service on George B. McGinty, Secretary of said Commission.

MAURICE SPLAIN,
United States Marshal.

Appearance of Interestate Commerce Commission, Intervening Defendant, by Counsel.

Filed November 12th, 1917.

We hereby enter the appearance of the Interstate Commerce Commission as intervening defendant, and of ourselves as its counsel, in the above-entitled cause.

JOS. W. FOLK,
CHAS. W. NEEDHAM,
Counsel for Interstate Commerce Commission.

Motion of the United States to Dismiss Petition.

Filed November 16th, 1917.

United States of America, defendant, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown that—

1. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce, and that it was regularly made and entered by the Commission in a proceeding properly pending and conducted.

2. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the issues made by the parties, and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

3. The petitioners have not in and by their said petition shown that in making its said order the Interstate Commerce Commission committed any error of law, or otherwise transcended the powers conferred upon it by the statute, or violated any right of the petitioners protected by the Constitution of the United States, or any other right of the petitioners over which this court may exercise jurisdiction.

120 4. The petition including the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the defendant and the court may not grant the relief prayed or any part of the same.

Wherefore, and for divers other good causes appearing on the face

of the said petition and the exhibits attached thereto and made a part thereof more fully to be pointed out on the hearing hereof, this defendant prays that its motion be sustained and for such other and further action as may be appropriate in the premises.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
RICHARD H. MANN,
United States Attorney.

Motion of Interstate Commerce Commission to Dismiss Petition.

Filed November 17th, 1917.

Now comes the Interstate Commerce Commission, intervening defendant in the above-entitled cause, by its counsel, and moves the Court to dismiss the petition filed herein, for the following reasons:

1. Upon the facts stated in the petition and the facts and conclusions in the report of this Commission attached as Exhibit "H" and made a part of the petition, the petitioners are not entitled to the relief prayed for, or any part thereof.

2. The petition shows that petitioners, and each of them, charged and collected from certain persons a less compensation for the transportation of property, subject to the provisions of the Act to regulate commerce, than they charged to and collected from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially
121 similar circumstances and conditions; that such practice was found by this Commission to constitute and be unjust discrimination in violation of section 2 of said Act; therefore, the order in controversy is justified and valid.

3. In making rates and charges for transportation services the petitioners may not discriminate between shippers, directly or indirectly, by any special rate, rebate, drawback or other device, and make a charge for a like and contemporaneous service greater to one shipper than is made or charged to another shipper.

4. The petitioners may not discriminate in their charges between shippers for like and contemporaneous services for the reason that the traffic of one shipper is "competitive," while the traffic of another shipper for the same service is "non-competitive," as set forth in said petition.

5. The questions whether services in transportation are like and contemporaneous, and whether a discrimination is unjust, are questions of fact to be determined by this Commission, and its jurisdiction over these questions is exclusive.

6. The facts and conclusions of this Commission stated in its report, Exhibit "H," support the order complained of.

7. The petition does not show that the order in question was beyond the constitutional or statutory authority of the Commission, nor that the petitioners were not accorded a full hearing, nor that there

was not sufficient evidence to support the findings and order of this Commission.

122 8. That by the petition and the report of this Commission made a part thereof as Exhibit "H" it appears that the matters and things set forth in said report and order were, and each of them was, within the constitutional and statutory authority of this Commission to hear and determine; that the plaintiff had a full hearing and that the order was based upon substantial evidence; therefore, this Court is without jurisdiction to grant the relief prayed for, or any part thereof.

9. The order in question is definite and can be complied with by the petitioners; but if the order is indefinite as alleged the remedy is to be sought before the Commission and not in this Court.

10. The petitioners have no constitutional right to create unjust discrimination between shippers to secure traffic.

Wherefore the Commission denies that the petitioners, or either of them, is entitled to the relief, or any part thereof, prayed for in said petition, and prays that the petition be dismissed.

JAS. W. FOLK,
CHAS. W. NEEDHAM,
Interstate Commerce Commission,
By its Counsel.

123 *Petition of Richmond Chamber of Commerce for Leave to Intervene as a Party Defendant.*

Filed November 17th, 1917.

Now comes the Richmond Chamber of Commerce and shows that it was the petitioner in the petition filed before the Interstate Commerce Commission, referred to in the bill of complaint in the above case, and therefore, it was a party in interest in the proceeding before the Commission referred to in said bill of complaint, in which the order or requirement was made which is the subject of attack in the above bill in this Court.

Wherefore, petitioner, Richmond Chamber of Commerce, prays that an order be entered allowing it to appear as a party defendant to the bill of complaint in the case above mentioned; that it may be represented by counsel in the above cause, which involves the validity of the order or requirement of the Interstate Commerce Commission and the interest therein of the Richmond Chamber of Commerce.

And petitioner will ever pray, etc.

RICHMOND CHAMBER
OF COMMERCE,
By WM. A. GASGOW, JR.,
Counsel.

Order Allowing Richmond Chamber of Commerce to Intervene as a Party Defendant.

Entered and Filed November 17th, 1917.

This cause coming on to be heard upon petition of the Richmond Chamber of Commerce, and the motion of said Company, by its counsel, Wm. A. Glasgow, Jr., of Philadelphia, Pennsylvania;

It is adjudged and ordered that the prayer of said petition be granted, and that the Richmond Chamber of Commerce be
124 and it is hereby made a party defendant to the bill in the case above mentioned, and that said Richmond Chamber of Commerce be permitted to be represented by counsel in the above cause.

J. C. PRITCHARD,
U. S. Circuit Judge.

Dated, November 17, 1917.

Opinion of the Court on Application for Interlocutory Injunction and Temporary Restraining Order.

Filed January 19th, 1918.
Before Pritchard and Woods, Circuit Judges, and Waddill, District Judge.

R. Walton Moore, Merrell P. Callaway and Frank W. Gwathmey, for petitioners, and Jas. W. Folk, Chas. W. Needham, Blackburn Esterline, Special Assistant to the Attorney General, and Richard H. Mann, United States Attorney, for Defendant, and William A. Glasgow for Richmond Chamber of Commerce.

PRITCHARD, *Circuit Judge:*

At certain points south of Richmond the Seaboard Air Line Railway Company, the Southern Railway Company, and the Atlantic Coast Line Railroad Company are competitors for traffic to and from that City. Each of these roads has switching facilities at Richmond connecting with the other. Each of them delivers traffic from competitive points to industries on its own tracks in Richmond at its tariff rate to Richmond, without extra charge for switching. Each of them charges, however, for car load freight received from a competitor from a competing point to be delivered to an industry on its own rails. To equalize the advantage which each has over the other as to industries on its own tracks, each of these roads absorbs the switching charge of its competitor on freight to be hauled by it to industries on its competitors' tracks.

Stating the matter more concretely and taking Oxford, North Carolina, as a competitive point, the Seaboard Air Line delivers

freight from that city to industries on its own rails without
125 extra charge beyond its tariff to Richmond. For freight consigned over the Seaboard for industries located on the rails of the Southern or Coast Line, the Seaboard absorbs the switching charge of the Southern or Coast Line, so that the cost to the shipper is the same as if he had shipped over the Southern or Coast Line to the industry on that line. The same rules are applied to shipments from industries located on the several switches to competitive points.

The Chesapeake & Ohio Railroad Company and the Richmond, Fredericksburg & Potomac Railroad Company have switching facilities connecting with the other roads above named, but they are not competitors for the southern business to and from Richmond. Basing the difference entirely on this absence of competition, the Seaboard, Southern and Coast Line do not absorb the switching charges on any freight to be delivered to industries on the switches of the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac.

Under a complaint of the Richmond Chamber of Commerce the Interstate Commerce Commission decided, three of the Commissioners dissenting, that this method of business of the Seaboard, Southern and Atlantic Coast Line was an unlawful discrimination against the industries on the Chesapeake & Ohio, and the Richmond, Fredericksburg & Potomac under Section 2 of the Interstate Commerce Act. The finding of the Commission is now before this court for review under a petition filed by the Seaboard Air Line Railway Company, the Atlantic Coast Line Railroad Company and the Southern Railway Company.

In addition to what we have said, the Commission, in pursuance of the principles underlying Wight vs. United States, 167 U. S. 512, and I. C. C. vs. Alabama Midland Ry. Co., 168 U. S. 144, found

"That the practice of the southern lines of absorbing switching charges only when the switching line actually competes with the line haul carrier on traffic to or from industries at Richmond under circumstances and conditions as defined in Section 2 is unlawful."

126 Section 2 of what is known as the act to regulate commerce, 24 Stat. 379, is in the following language:

"That if any common carrier subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers, or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The first question arising in this case is as to whether the industries situated on the following railroads: Richmond, Fredericksburg & Potomac, Seaboard Air Line, Atlantic Coast Line, Chesapeake & Ohio and Southern are to be treated as a unit—that is a group of industries engaged in doing business at Richmond? If they are, then we think the solution of this problem becomes comparatively easy. All the shipments in question are billed to and received at Richmond, and are, therefore, similarly situated. It was obviously the intention of Congress in the enactment of Section 2, above quoted, to secure precisely the same kind of treatment for all industries that are similarly situated. We think that the cases of Wight vs. United States, supra, and I. C. C. vs. Alabama Midland Railroad Company, supra, are decisive of the points involved in this question. The commission in reaching the conclusion that the defendant carriers were liable under Section 2, and in discussing this phase of the question, among other things, said:

"If absorption practices are to be uniform, as defendants contend they should be, and if they are to be based upon a definite principle, there is no reason why that principle should not be uniformly applied. At Richmond a certain theory is employed because the Southern lines have agreed to employ it; at other cities an entirely different theory exists, not because of any difference in the matter of carriage, but because such different theory best suits the carriers serving those points. In other words, the Southern lines
127 would apply the restricted theory wherever they can, and would conform to a different practice at places whose policy they cannot seriously influence.

At Richmond, most of the competition experienced by the Southern lines is with each other, little coming from either the Chesapeake & Ohio or the Richmond, Fredericksburg & Potomac. If, therefore, they intentionally or accidentally agree upon a uniform absorption practice, there is no other carrier competition to prevent its execution.

If it be true that absorption must be governed entirely by competitive influences, it may well be argued that only that competition which is compelling should be recognized. All of these defendants contend that absorption is compelled when there is competition with the switching lines, but the southern carriers insist that this is the only competition which is compelling. If the shipment originate at a point common to all of the southern lines, destined to an industry in Richmond on the tracks of the Chesapeake & Ohio, the traffic is certainly competitive to Richmond, but because the Chesapeake & Ohio is not a competitor the switching charge of that line is not absorbed. In other words, such traffic ceases to be competitive upon its arrival at Richmond. If the same car were destined to an industry on the rails of the Seaboard Air Line, the switching charge of that carrier would be absorbed by the Atlantic Coast Line or the Southern Railway, and such industry would have an advantage over the Chesapeake & Ohio industry to the extent of the absorption. In the one case the shipper or consignee would pay only the Richmond rate; in the other, he would pay the Richmond rate plus the switching

charge. The only justification offered for this advantage is that the Seaboard Air Line, Atlantic Coast Line, and Southern are rival roads, and that the transportation is therefore not performed under circumstances and conditions substantially similar to those attendant upon the transportation to the Chesapeake & Ohio industry. But the Supreme Court has said that 'the phrase under substantially similar circumstances and conditions, as used in the second section, refers to the matter of carriage and does not include competition between rival roads.' Wight v. U. S., 167 U. S. 512; I. C. C. v. Alabama Midland Ry. Co., 168 U. S. 144. In cases where the traffic moves from the same points of origin, and the switching charge is absorbed in the one case and not in the other, there is a violation of section 2, as the existence of competition in the one case and not in the other clearly does not constitute a substantial dissimilarity of circumstances and conditions. Even, however, in the case of traffic which moves from different points of origin, and where it may be that section 3 along applies we do not think the competitive conditions relied upon are sufficient to constitute a substantial dissimilarity of circumstances and conditions within the meaning of that section. Traffic Bureau of Nashville vs. L. & N. R. R. Co., 28 I. C. C. 533.

* * * * * * *

We have found that the refusal of the defendants to absorb switching charges on some car load shipments at Richmond while absorbing such charges on other carload shipments to and from that point is unjust discrimination against the shippers who are required to pay such charges * * *. The defendants will be required to cease and desist from such discrimination in the future."

It is strenuously insisted that in the case of Wight vs. United States, supra, the transfers in question were made by drayage,
128 and that, therefore, that case is easily distinguished from the case at bar. While it is true that the transfer in the Wight case was not made by rail connection, nevertheless the result of what was done in that case as respects discrimination is precisely the same as in this case. The evil sought to be cured by the statute was discrimination in favor of one party as against another similarly situated, and we fail to understand upon what theory it may be said that the absorption or transfer charges which relieves the shipper from the payment of switching charges could be held to be different from a case where a railroad paid the drayage charges for one shipper and refused to pay the same for another.

Commissioner Harlan in his concurring opinion, referring to the Wight case, among other things, said:

"As I have understood it, the court there lays down the broad general doctrine that, as between two shippers at the same rate point, competition between carriers does not excuse or justify a discrimination of the character condemned as unlawful under section 2 of the act. And a careful reading of the case seems not to permit of the suggestion that the court could have reached just the opposite conclusion if, instead of a horse and cart, the Baltimore & Ohio had hired a switching line to deliver the traffic to the industry on the rails of its competitor, and had thus accomplished, merely by the use of different

facilities, precisely the same discrimination which, in the case under discussion, was declared to be unlawful."

The one was as much a discrimination as the other. Therefore, we think that the Commission was correct in holding that the Wight case is determinative of the questions involved in these proceedings. To hold otherwise would simply result in the annulment of the plain provisions of the Statute. It cannot be reasonably insisted that industries located on lines belonging to carriers other than the defendants, but receiving shipments at Richmond, do not constitute a part of the industries doing business at that place.

We are of opinion that the Act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous;" also
129 as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circumstances and conditions." Texas & P. R. Co. vs. I. C. C., 162 U. S. 197. While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. I. C. C. vs. Ill. Cent. R. Co., 215 U. S. 452; I. C. C. vs. D. L. & W., 220 U. S. 235; Pa. R. Co. vs. International Coal Co., 230 U. S. 184; L. & N. R. Co., 235 U. S. 314.

The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law. Therefore, we are of opinion that the petitioners are not entitled to the relief for which they pray, and this being a case where only injunctive relief is sought the petition will be denied and the bill

Dismissed.

I concur.

EDMUND WADDILL, JR.,
Dist. Judge.

I dissent—see separate opinion.

C. A. WOODS,
Circuit Judge.

Dissenting Opinion of Honorable Charles A. Woods, United States Circuit Judge, on Application for Interlocutory Injunction and Temporary Restraining Order.

Filed January 19th, 1918.

WOODS, *Circuit Judge,* dissenting:

The facts are sufficiently stated in the majority opinion.

The decision depends upon the application of the following
130 sections of the Interstate Commerce Act:

"Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive

from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than its charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Section 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The controversy comes down to this:

If transportation to Richmond is to be regarded unitary, and the delivery to different industries on tracks of the different roads merely incidental to delivery in Richmond and not a separate item of carriage, then all switching charges must be put on the same basis under Sec. 2. On the other hand, if the law contemplates that carriage to the depot of each railroad in Richmond or to an industry on its own switch is to be regarded as transportation to one destination, and transportation from the depot of each railroad to an industry on the switch of another railroad is to be regarded a separate act of transportation of another road to its ultimate destination, then the switching charges to industries on the different railroads may be charged differently under Section 3, provided the difference is reason-
131 able and founded on substantial difference in condition; and in determining whether there is a substantial difference in conditions the fact of competition may be taken into the estimate under that section.

Prior to its decision in this case, the Interstate Commerce Commission has always considered switching carriage as a separate service for which a separate tariff may be made. Leonard v. Chicago, etc. R. R. Co., 12 I. C. C. Rep. 492; Curtis v. Southern Pac. R. R. Co., 23 I. C. C. Rep. 372; Ohio, etc. Co. v. Chicago, etc. Co., 28 I. C. C. Rep. 703. In the Curtis case it is stated that this is the general practice of the railroads in the United States. The right of the carrier to treat the terminal charge as a different item of carriage and the different industries on the switch lines as different terminals is clearly recognized in

Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105, in this language:

"By Sec. 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside, the mere matter of transportation over its line, it may charge and receive compensation. Southern Railway Co. v. St. Louis Hya Co., 214 U. S. 297."

Accordingly the United States Supreme Court has always considered the lawfulness and reasonableness of switching charges under Section 3 and not under Section 2. Pennsylvania R. R. Co. v. United States, 236 U. S. 351; Louisville & N. R. R. Co. v. United States, 238 U. S. 1; Louisville & N. R. R. Co. v. United States, 242 U. S. 60.

Competition is a fact which both the carrier and the shipper have a right to have estimated in the decision whether terminal charges and differences in them are reasonable. Whether competition is
132 a fact of such practical importance in every instance as to justify terminal charges based on that alone is, of course, a question for the Interstate Commerce Commission. Interstate Commerce Commission v. Alabama, etc. R. R. Co., 168 U. S. 144, 166; Louisville & N. R. R. Co. v. United States, 238 U. S. 1.

The view of the majority of the Commission is that to make a distinction in switching charges at Richmond or any other city based on competition between rival lines is to violate Section 2 of the Act. But that section was intended to enforce equality to shippers over the same line and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance and under the same conditions of carriage are compelled to pay different prices therefor. Interstate Commerce Commission v. Alabama, etc. Co., supra. Hence, the conclusion of the majority of the Commission must necessarily rest on the proposition that a shipment over any road into Richmond has reached its railroad destination as soon as it reaches the railroad's terminal in Richmond, and that transportation by another road over its rails to the consignee is not a separate transportation on another line but a mere incident of delivery, and that therefore all industries on any of the other roads must be put on a basis of equality without respect to competition. This conclusion was reached on the theory that the decision in the case of Wight v. United States, 167 U. S. 512, is inconsistent with the practice of the Interstate Commerce Commission sanctioning the custom of railroads in making switching service a separate tariff item. I think it clear that this case has no such bearing.

The Wight case relates entirely to an advantage given to one shipper, Bruening, over another by a rebate of three and a half cents a hundred pounds, the cost of drayage from the railroad
133 depot to his store house, in order to equalize his rate and to get his business from a competing road on which his industry was situated; whereas Wolf, his competitor whose store house was not situated on the competing road had to pay his own drayage. In such

case the court necessarily held that such a practice was not only in fact giving a rebate in violation of Sec. 2, but would open the door to the abuses which that Section was obviously intended to prevent. The drayage there paid for by the railroad was not a part of railroad transportation: switching by another road after delivery to it is a different act of railroad transportation on a separate line. In that case it was held that the railroad company could not on the ground of competition pay for a service entirely out of its line of business, but this decision gives no countenance to the idea that competition may not be taken into the account in fixing the tariff for railroad switching service.

Since transportation on a railroad switch to industries in a city located on other roads is carriage to a different destination separate from the line haulage and subject to a different tariff, it follows under the decisions above cited that competition may be taken into consideration in fixing the charges, and that the petition should be granted.

The decision in which the majority of the Interstate Commerce Commission concurred was made on the ground that as a matter of law competition could not be taken into account in fixing switching charges in the circumstances stated. In this I think that there was error of law. Of course, I intimate no opinion as to whether competition in this particular instance furnished a reasonable basis for absorbing the charges for delivery on the switches of competing roads and not absorbing them on the switches of non-competing roads. That is a question for the Commission which this court has no
234 power to anticipate.

I think the injunction should be granted.

Decree Denying Interlocutory Injunction and Temporary Restraining Order and Dismissing Petition.

Entered and Filed January 19th, 1918.

This cause, which was argued and submitted, on the 17th day of November, 1917, upon the application for an interlocutory injunction and temporary restraining order, came on this 19th day of January, 1918, to be again heard upon the papers formerly read, and upon the said application, and the pleadings and proofs, and was argued by counsel.

Upon consideration whereof, the Court, for reasons stated in writing and herewith filed as a part of the record, doth adjudge, order and decree that the injunction prayed for be denied, and the said petition dismissed at the cost of the petitioners.

J. C. PRITCHARD,
U. S. Circuit Judge.
C. A. WOODS,
U. S. Circuit Judge.
EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Richmond, Va., January 19", 1918.

Petition for Appeal of Seaboard Air Line Railway Company et al

Filed February 5th, 1918.

To the Honorable Edmund Waddill, Jr., United States District Judge:

135 The above named Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company and the Atlantic Coast Line Railroad Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 19th day of January, 1918, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., according to the rules of said court in such cases made and provided.

And petitioners further pray that the proper order be made relating to the security to be required of them.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Assignment of Errors.

Filed February 5th, 1918.

Now come the petitioners in the above-entitled cause and present this their assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court from the decree entered in said cause on January 19, 1918.

1.

The Court erred in sustaining and not annulling the order of the Interstate Commerce Commission described in the petition
136 and set forth in Exhibit I which is therewith. The Commission, in making and issuing the said order, held that the practice of the petitioners to which it has reference is unjustly discriminatory and unlawful within Section 2 of the Act to Regulate Commerce (24 Stat. 379), whereas the said section is wholly inapplicable and should have been so found by the Commission and the Court. Such practice, which is correctly described in the petition and as to which the evidence is free from conflict, consists in the refusal of each of the petitioners, as a line-haul carrier of certain interstate carload freight, to absorb the switching charges thereon at Richmond, Virginia, while at the same time it absorbs the switching

charges on certain other interestate carload freight at Richmond. In a case where the switching charges are absorbed the freight moves between a point outside of Virginia and an industry in Richmond, the through transportation between origin and destination being made up of the movement over the tracks of the carrier performing the line haul and the additional movement over the tracks at Richmond of the carrier, or carriers, performing the switching haul to or from the industry and the separately-published tariffs of the line-haul and switching carrier, or carriers, taken together provide for, and govern, the through transportation and through charges from oigin to destination. In a case where the switching charges are not absorbed the freight moves between the same point outside of Virginia as in the other case of the absorption, but a different industry in Richmond. The through movement from origin to destination in the latter case is over the tracks of the same petitioner as line-haul carrier, but of a different switching carrier, or carriers, at Richmond, and, in most instances, via a different point of connection and interchange in said city, and the separately-published tariffs of
137 the line-haul and switching carrier, or carriers, in such case, taken together, provide for and govern the through transportation and total charges from origin to destination. The through route and service, when the charges are absorbed, are not the same route and service as when the charges are not absorbed, nor are the same through rates provided by the tariffs. The transportation service is not "like" in both cases or over the same lines, or for the same distance, nor is it performed under substantially similar circumstances and conditions within the meaning of said section 2.

2.

The Court erred in denying the application and prayer of the petitioners for an interlocutory injunction and for a perpetual injunction to restrain the enforcement of the aforesaid order of the Interstate Commerce Commission.

3.

The Court erred in holding that the practice of petitioners, referred to in the aforesaid order of the Interstate Commerce Commission, from which it required petitioners to cease and desist, was, is, or ever has been contrary to the provisions of Section 2 of the Act to Regulate Commerce, or otherwise unlawful.

4.

The Court erred in approving the conclusions of the Interstate Commerce Commission on which its aforesaid order was based. Upon the facts, as to none of which there was or is any dispute, the Commission should have concluded, and the Court should have found and decreed as matter of law, that the said Section 2 is wholly inap-

plicable, and that the service where the absorption of the
138 switching charges is refused as aforesaid is not a like and contemporaneous service under substantially similar circumstances and conditions as that which is rendered when the switching charges are absorbed as aforesaid. The error in condemning the practice of the petitioners as violative of Section 2 of the Act to Regulate Commerce as aforesaid results in a denial of the right of the petitioners to make, or participate in, different rates to and from separate and distinct industries on separate and distinct railroads in Richmond.

Wherefore petitioners pray that said decree may be reversed and such other relief given them as may be proper.

And as in duty bound petitioners will ever pray, etc.

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Order Allowing Appeal and Fixing Amount of Appeal Bond.

Entered and Filed February 5th, 1918.

In the above entitled cause, Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and The Atlantic Coast Line Railroad Company, petitioners, having made and filed their petition praying an appeal to the Supreme Court of the United States from the decree and order of the District Court entered on January 19th, 1918, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided.

It is ordered and decreed that the said appeal be and the
139 same is hereby allowed as prayed, upon the execution of a bond in the sum of $1,000.00 with security to be approved by the court, and conditioned and payable as the law directs. And the clerk is directed to transmit a properly authenticated transcript of the record and proceedings, with all things thereunto relating, to the Supreme Court of the United States.

EDMUND WADDILL, JR.,
United States District Judge.

Richmond, Va., February 5", 1918.

Appeal Bond.

Approved and Filed February 5th, 1918.

Know all men by these presents, That we, Southern Railway Company, as principal, and the American Surety Company of New York, a corporation duly authorized to do business in the State of

Virginia, and duly empowered, among other things, to sign as surety bonds of this character, are held and firmly bound unto the United States of America, defendant in the above named case, and unto the Interstate Commerce Commission and the Richmond Chamber of Commerce, intervening defendants, in the sum of one thousand dollars ($1,000) lawful money of the United States, to the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this fourth day of February, 1918.

The condition of the above obligation is such that, whereas the above named Southern Railway Company and the Seaboard Air Line Railway Company, Seaboard Air Line Railway and At-
140 lantic Coast Line Railroad Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree and order of the District Court of the United States for the Eastern District of Virginia, entered on January 19, 1918, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Southern Railway Company, Seaboard Air Line Railway Company, Seaboard Air Line Railway, and Atlantic Coast Line Railroad Company, shall prosecute their said appeal to effect, and shall answer all costs if they fail to make good their plea, and shll perform and abide by the final order and judgment of the Supreme Court of the United States, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN RAILWAY COMPANY,
OF N. Y.,
By H. B. SPENCER,
[CORPORATE SEAL.] *Vice-President.*
AMERICAN SURETY COMPANY
By P. S. POWERS,
[CORPORATE SEAL.] *Agent.*

The within bond is hereby approved both as to sufficiency and form, this 5" day of February, 1918.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Præcipe as to Record on Appeal.

Filed February 5th, 1918.

The clerk will please copy and certify to the Supreme Court of the United States as the record on appeal the entire record
141 in the lower court.

F. W. GWATHMEY,
M. P. CALLAWAY,
R. WALTON MOORE,
Solicitors for Petitioners.

Service of a copy of the within præcipe is hereby acknowledged, and it is agreed that the record on appeal shall be made up in the manner therein stated.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For the United States.
CHAS. W. NEEDHAM,
For the Interstate Commerce Commission.
WM. A. GLASGOW, JR.,
For the Richmond Chamber of Commerce.

Notice to Attorney General of Virginia of Appeal.

Filed February 11th, 1918.

To the Honorable John R. Saunders, Attorney General of Virginia:

Please take notice that upon application of Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company, petitioners in the above named proceeding, the District Court, by order dated February 5, 1918, has allowed an appeal to the Supreme Court of the United States from the decree entered on the 19th day of January, 1918, in said proceeding, and citation has been issued to the defendant and intervening defendants returnable at the
142 Supreme Court in Washington, D. C., on the 5th day of March next.

This notice is given pursuant to the requirement of Chapter 32 of the Act of Congress of October 22, 1913 (38 Stat. L. 219).

R. WALTON MOORE,
MERREL P. CALLAWAY,
FRANK W. GWATHMEY,
Solicitors for Petitioners.

Acceptance of Services of Notice of Appeal.

Service of the within notice is hereby acknowledged this 8th day of February, 1918.

JNO. R. SAUNDERS,
Attorney General of Virginia.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the United States of America, the Interstate Commerce Commission and the Richmond Chamber of Commerce, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court to be holden at Washington on the 5th day of March next, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and the Atlantic Coast Line Railroad Company are Petitioners, and you are Defendants to show cause, if any there be, why the decree rendered against the said Seaboard Air Line Railway Company and others in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

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Witness, the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, this 5th day of February, in the year of our Lord one thousand nine hundred and eighteen.

EDMUND WADDILL, JR.,
United States District Judge.

Acceptances of Service of Citation.

Service of a copy of the within citation is hereby acknowledged this sixth day of February, 1918.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For the United States.
CHAS. W. NEEDHAM,
For the Interstate Commerce Commission.
WM. A. GLASGOW, JR.,
For the Richmond Chamber of Commerce.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record together with all things thereunto relating, made in accordance with præcipe of counsel as appears herein, in the cause of Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern

144

Railway Company and the Atlantic Coast Line Railroad Company, Petitioners, versus The United States, The Interstate Commerce Commission, and the Richmond Chamber of Commerce, Defendants, in Equity No. 37.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at the City of Richmond, this 15th day of February, 1918.

[Seal of the United States District Court of Virginia, Eastern District.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

Endorsed on cover: File No. 26,336. E. Virginia D. C. U. S. Term No. 869. Seaboard Air Line Railway Company, Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railroad Company, appellants, vs. The United States of America, The Interstate Commerce Commission, and The Richmond Chamber of Commerce. Filed February 16th, 1918. File No. 26,336.

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IN THE

Supreme Court of the United States

October Term, 1920.

No. 27

SEABOARD AIR LINE RAILWAY COMPANY ET AL.

vs.

THE UNITED STATES OF AMERICA ET AL.

BRIEF OF ARGUMENT FOR APPELLANTS.

STATEMENT OF THE CASE.

The case comes up on appeal from a decree of the District Court of the United States for the Eastern District of Virginia denying injunction and dismissing the bill. (Trans. 81.)

The bill was filed November 6, 1917, in the District Court of the United States for the Eastern District of Virginia, three judges sitting. The bill, or petition, appears in the Transcript at pages 2 to 20, inclusive.

The object and prayer of the bill is to restrain and

enjoin the enforcement of an order of the Interstate Commerce Commission condemning certain practices of the appellant railroads at Richmond as unlawful under Section 2 of the Commerce Act and requiring the establishment of other practices, the effective date of the order being August 1, 1917. (Trans., 62, 63.)

The effective date of this order was postponed from time to time. (Trans., 65.)

The bill sets out the facts, which are all admitted and undisputed.

Briefly and concretely, these facts are that for many years each of the appellant railroads, the Seaboard Air Line, the Southern, and the Atlantic Coast Line, reaching Richmond, Va., has been in the habit of hauling traffic from various points, such as its station at Oxford, N. C., and delivering same at Richmond to stations on its own line or to industries located on its own switch tracks at certain rates published in the tariffs.

Oxford, N. C., is taken as a point of origin, representative of places reached by two or more railroads, for instance, by the Southern Railway and the Seaboard Air Line Railway.

The practice is for the Southern Railway, for example, to haul traffic from points like Oxford and deliver it to the shipper at its own depot in Richmond, or at industries located on its own side-tracks in Richmond, at a certain rate.

The Seaboard Air Line does the same thing as to traffic hauled from Oxford over its own rails to stations on its own lines or to industries located on its own side-tracks at Richmond.

If the Seaboard hauls traffic from Oxford, N. C., destined to an industry or point of delivery on the

switch-tracks of the Southern at Richmond, it "absorbs" the switching charge of the Southern or "extends" the Oxford rate to such industry, so that the shipper pays exactly the same rate as if the haul were entirely over the Southern from Oxford.

The Southern does the same in similar case.

Each of the railroads also hauls traffic from Oxford over its own rails to its points of interchange in Richmond with the other railroads not reaching Oxford, and there turns the traffic or cars over to such connecting carrier, from which point the traffic is switched by such other railroad to industries located on its own tracks, and then delivered to the shipper.

In such case, delivery to the consignee does not take place at the interchange tracks, but the connecting or switch railroad takes possession of the car and traffic, and hauls same with its own engine and crew over its tracks a further distance or journey by railroad to the industry of the consignee where delivery is then made to him.

In such case there is no "absorption" of switching charges, or "extension" of rate as herinafter explained.

The typical method as to "absorption" of switching charges or "extension" of the rate from point of origin to an industry located on a railroad at Richmond which does not reach the common point of origin is as follows:

For instance, taking the example used by the Commission, it has been the practice of the Seaboard Air Line Railway, under the tariffs, to haul traffic from Oxford over its own rails to its interchange tracks with the Southern at Richmond, whereupon the Southern will switch the traffic to an industry on the Southern's

rails and the Seaboard will pay the cost of switching, thus enabling the shipper at Oxford to send the goods from Oxford over the Seaboard to an industry located on the switch tracks of the Southern at Richmond, at exactly the same rate which the Southern would charge for hauling it all the way over its own rails from Oxford to said industry located on its own tracks.

The Southern will also haul traffic from Oxford to the same interchange tracks with the Seaboard at Richmond and pay the Seaboard for the switching to the industry located on the rails of the Seaboard, thus enabling the shipper at Oxford to send traffic over the Southern to the industry located on the Seaboard at exactly the same rate as if the haul were made direct and all the way over the Southern from Oxford to the industry.

This practice is spoken of in the record as "absorption" of switching charges, and it is sometimes spoken of as "extension" of the rate from Oxford to the industry at Richmond.

Commissioner Hall in his dissenting opinion, page 58 of the Transcript, says that the correct and accurate term to use is "extension."

At all events, such is the practice.

Now, when the traffic originating at Oxford is not destined to any industry located on the lines of either the Southern or the Seaboard at Richmond, but is located on some line not reaching Oxford, either the Southern or the Seaboard will haul the traffic to Richmond, bring it up to its individual point of interchange with such third line of railway, which point of interchange is always at a totally different place from that between the Southern and the Seaboard, and the consignee or shipper in such case has to pay a switching

charge to have the traffic hauled from the interchange track of either the Southern or the Seaboard to his industry on the third railroad.

In other words, in such case the switching charge is not "absorbed," or the rate from Oxford is not "extended" to the industry.

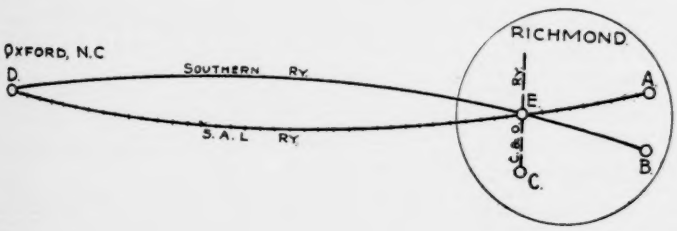
The majority of the Commission hold that this latter practice violates Section 2 of the Commerce Act. Four of the Commission were of this opinion, and two of these filed separate concurring opinions. (Trans., 40 to 45, inclusive.)

Three of the Commission dissented, filing two separate opinions. (Trans., 56, 62.)

The majority of the District Court concurred with the majority of the Commission, Pritchard, Circuit Judge, filing the opinion of the Court (Trans., 74-78), and Woods, Circuit Judge, filing a dissenting opinion (Trans., 78-81).

The majority of the Commission reach their conclusion by the following process.

They assume a haul from Oxford, N. C., to points in Richmond represented by the following diagram (reproduced from Trans., 46), to which we have added the letters D and E for the sake of clarity.



E on the diagram is assumed by the majority of the Commission to be the point of interchange by and between three railroads in Richmond, from which switch-tracks radiate to industries located respectively at A. on the tracks of the Seaboard Air Line, B. on tracks of the Southern Railway, and C. on the tracks of the Chesapeake & Ohio. These industries are said to be "substantially equidistant from the respective interchange tracks." (Trans., 49.) This assumption, contradictory of the admitted facts, is almost the foundation stone of the erroneous opinion of the majority of the Commission.

This assumption is erroneous under the admitted facts, for there is no point in Richmond where three different railroads interchange, and there is no such point in Richmond from which the industries are "substantially equidistant."

We will pass this for the present, however, and for the moment accede to this erroneous assumption.

The majority of the Commission considers it a violation of Section 2 for the Seaboard to "absorb" switching charges or to "extend" the Oxford rate to industry B. on the tracks of the Southern, while declining to do so to Industry C., same being on a road (the Chesapeake & Ohio) which does not reach Oxford.

In other words, in that instance the Oxford rate is charged to E., the point of interchange, and not "extended" to C.

The industry at C. pays a switching charge in addition to the rate from Oxford, and same is not "absorbed."

Plainly this is not a violation of Section 2, because the haul from D. to C. is not the same distance as the haul from D. to E.

Nor is C. the same point of arrival as E. The goods are not delivered to the shipper at E. but to a connecting railroad, and hauled a farther distance by it to C., where delivery to the consignee is for the first time made.

The rate from D. to C., therefore, may be different or the same as the rate from D. to E. It may be more or it may be less, or it may be the same, in so far as Section 2 is concerned, for Section 2 is wholly inapplicable unless:

> The haul is "over the same line, the same distance, under the same circumstances of carriage." 167 U. S., 512, 518.

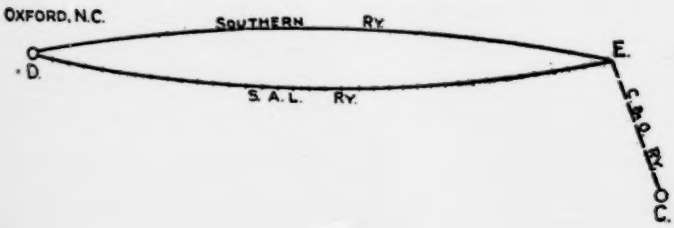
This is also self-evident as to industry A. as compared with C. This is a wholly different point of arrival from C., as an inspection of the diagram shows, and the distances are different.

Before Section 2 can apply at all,

> "* * * the termini of both arrival and departure must be the same."
> Denaby Main Colliery case, XI App. Cas., 97.

to use the language of Lord Chancellor Halsbury.

Reduced to its simplest form, the whole case is illustrated by the following diagram:



We are still accepting the erroneous assumption of the majority of the Commission that E. is a point where **three** railroads interchange in Richmond. There is no such point in fact.

Traffic from point D., Oxford, is hauled to E., the interchange track at Richmond, at the Oxford rate.

It is handed over to a connecting railroad and thence switched to C. on the Chesapeake & Ohio, and the switching charge is added to the rate.

This does not offend Section 2, because the distance from D. to E. is not the same as the distance from D. to C. and because E. and C. are not the same points of arrival.

The rate D. to C. may be greater than the rate D. to E., or less than the rate D. to E., or the same as the rate D. to E., in so far as Section 2 is concerned. Section 2 has no application at all unless the haul is "over the same line, the same distance, under the same circumstances of carriage." (167 U. S., 512, 518.)

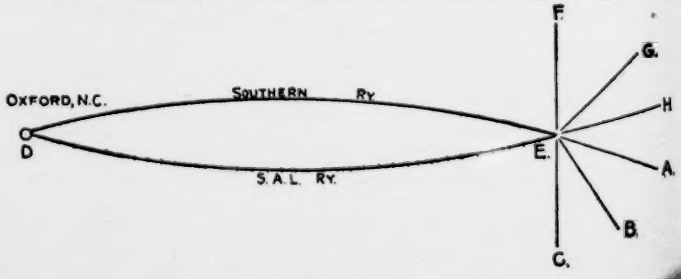
It has no application except between the same points of "departure and arrival."

This should be always borne in mind.

So it makes no difference how many switch tracks radiate from point E.

The more there are the more different points of arrival they reach, and if it is possible to make a thing which is wholly inapplicable still more so, this would accomplish that result.

For instance, let us observe the following diagram:



Instead of one point of arrival different from E., we have here six.

Not one of the six is obliged to take the same rate as E. For not one of the six is the same point of arrival as E.

Not one of the six is obliged to take the same rate as E., because not one of them is the same distance as E. from the common point of departure D.

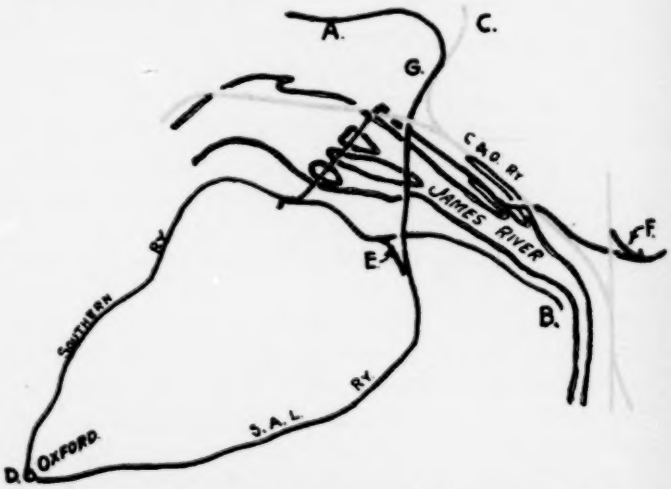
In so far as Section 2 is concerned the rate to any one of these six points of arrival may be the same as the rate from D. to E., or less than the rate from D. to E., or more than the rate from D. to E., or they may all vary.

The switching charge to one of these six points of arrival may be "absorbed" or the rate from D. to E. "extended" to such point, and not to any of the others, and this would not offend Section 2 at all, as it only applies where the distance is the same and the point of arrival is the same from the same point of departure. We ask that it be especially observed that we use the singular number, for Section 2 only applies where the haul is over the same distance between the same point of departure and arrival. So far we have accepted the erroneous assumption of the Commission, and stated that even under that, Section 2 does not apply.

But the error of the "substantially equidistant" theory of the majority of the Commission becomes more sharply apparent by considering the admitted and undisputed facts.

Section one of the petition at Trans., pp. 3 and 4, sets out the interchange tracks as they are really located and refers to the map Ex. A. immediately following page 20, Trans., whereon they are delineated.

The Commission's diagram, page 46, Trans., modified to accord with the admitted and undisputed facts, appears as follows:



A., B., and C. on above diagram represent industries located respectively on tracks of the Seaboard, the Southern, and the Chesapeake & Ohio.

D. is Oxford.

E. is point of interchange by and between Southern and Seaboard at Manchester, now called South Richmond, south of river.

F. is point of interchange north of the river by and between Southern and Chesapeake & Ohio.

G. is point of interchange north of the river by and between Seaboard and Chesapeake & Ohio.

We now perceive that industry C. on the tracks of the Chesapeake & Ohio Railroad is not located south of the River James, as the Commission's diagram shows it, but it is in fact north of the river.

G. on correct diagram is the point of interchange by

and between the Seaboard and the Chesapeake & Ohio Railroad and is located north of the River, and is not anywhere near the point of interchange (E. on correct diagram) by and between the Southern and the Seaboard south of the river.

Instead of being at that spot, as indicated on the diagram of the Commission, it is 2.5 miles distant across the river.

To reach industry C. north of the river on the Chesapeake & Ohio, traffic hauled by the Seaboard from Oxford never passes through point E. at all, but goes entirely around same and is hauled across the river over its own rails to point G. on correct diagram, the point of interchange by and between the Seaboard and the Chesapeake & Ohio, and is thence switched by the Chesapeake & Ohio to industry C.

The Chesapeake & Ohio runs over a "viaduct" along the north bank of the river and partly in the river itself, as shown on map, Ex. A., Trans. The Chesapeake & Ohio has no tracks at all south of the river.

It is needless to pursue the hauls from Oxford over the Seaboard to industries A. and B.

Nor will we stop to describe and follow minutely the hauls over the Southern from Oxford to the respective industries A., B., and C. on correct diagram.

Suffice it to say they are all equally, or even more, complicated than the one above detailed, to industry C. on the Chesapeake & Ohio for traffic brought by the Seaboard Air Line from Oxford. They are all different and none of them for the same distance.

The Southern and Seaboard cross from the south side of the river to the north side of the river on long, high and expensive bridges above and over the top of the concrete viaduct on which the Chesapeake & Ohio runs.

All these admitted facts prevent the correct diagram from looking as symmetrical as the diagram of the Commission, and also prevent any of the hauls from being "substantially equidistant from the respective interchange tracks." (Maj. Op. Comm., Trans., 49.)

All these admitted facts also prevent any of the hauls from being "over the same line, the same distance, under the same circumstances of carriage." (167 U. S., 512, 518.)

All these admitted facts also prevent any of the hauls from being between the same termini of departure and arrival.

The simultaneous existence of all of which is essentially and indispensably prerequisite before Section 2 applies at all.

It may be remarked that when the majority of the Commission bases its decision on the theory that Section 2 would be violated were the hauls "substantially equidistant from the respective interchange tracks" (Trans., 49), it immediately states the case entirely outside of Section 2.

The imperative requirements of Section 2 are not satisfied by "substantially equidistant" hauls.

Exactly "the same distance" is remorselessly demanded. If it were a fact that the hauls were "substantially equidistant," because of that very fact, and for that very reason, they would not and could not be "the same."

Similis ergo non eadem.

The majority opinion of the Commission states the case entirely out of the Statute and out of Court.

Another very important thing should be always borne in mind, namely, the admitted fact that the interchange track is *not* the common point of departure at all, as

the majority of the Commission seems to treat it in this phase of the case, but the interchange track as to cars and traffic destined to an industry located on a third railroad not reaching Oxford, is solely a point of connection with a new railroad that performs an additional and prolonged rail haul completing the journey from Oxford, the real and only common point of departure.

In this instance the interchange track is simply like any one of the multitude of depots and stations between D. (Oxford) and C., the industry where delivery to the consignee is made and the point of arrival reached.

We now pass on to other matters that should be brought to the attention of the Court in the Statement of the Case.

When the case first started before the Commission, some other questions also were involved. But after a hearing and a rehearing by the Commission, and after it had changed its first opinion (Trans., 29-37), to a large extent, and after it had filed its second opinion on rehearing (Trans., 40-50), every question was eliminated except the proper construction and application of Section 2 of the Commerce Act.

For instance, the Commission now holds that there was no undue discrimination as between Norfolk and Richmond (Trans., 40); that the practices involved do not violate Section 3 of the Commerce Act (Trans., 46); that there is no violation of Section 1 and no question that the rates are reasonable *per se* (Trans., 36); that even Section 2 is not involved with respect to points of origin strictly local and only reached by one road, like Norlina, N. C. (Trans., 46, 49.)

So the sole question before this Court is one of law as to the proper construction and application of Section 2 of the Commerce Act.

We not only admit, but we assert, with respect to Section 2 that competition cannot be considered at all.

If Section 2 applies, competition is no excuse whatever for violating it.

No discrimination at all is justified. But *before* we need to examine or enter into the question of discrimination in any respect, we must settle the point as to whether Section 2 applies at all.

It only serves to confuse the issue to wander away on the subject of discrimination before we ascertain whether or not Section 2 applies.

The first and foremost thing is to determine whether or not Section 2 applies at all.

If it does not, we need not concern ourselves with the subject of discrimination.

The sole question in the case is whether or not Section 2 applies.

We respectfully say that Section 2 does not apply at all.

The lines are not the same; the hauls are not over the same line.

The distances are not the same; the points of arrival and departure are not the same.

The circumstances of carriage are not the same.

All of these must concur and exist simultaneously before a case can come within the ambit of the Act.

ASSIGNMENT OF ERRORS.

Now come the petitioners in the above-entitled cause and present this their assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court from the decree entered in said cause on January 19, 1918.

1.

The Court erred in sustaining and not annulling the order of the Interstate Commerce Commission described in the petition and set forth in Exhibit I which is therewith. The Commission, in making and issuing the said order, held that the practice of the petitioners to which it has reference is unjustly discriminatory and unlawful within Section 2 of the Act to Regulate Commerce (24 Stat. 379), whereas the said section is wholly inapplicable and should have been so found by the Commission and the Court. Such practice, which is correctly described in the petition and as to which the evidence is free from conflict, consists in the refusal of each of the petitioners, as a line-haul carrier of certain interstate carload freight, to absorb the switching charges thereon at Richmond, Virginia, while at the same time it absorbs the switching charges on certain other interstate carload freight at Richmond. In a case where the switching charges are absorbed the freight moves between a point outside of Virginia and an industry in Richmond, the through transportation between origin and destination being made up of the movement over the tracks of the carrier performing the line-haul and the additional movement over the tracks at Richmond of the carrier, or carriers, performing the switching-haul to or from the industry and the

separately published tariffs of the line-haul and switching carrier, or carriers, taken together provide for, and govern, the through transportation and through charges from origin to destination. In a case where the switching charges are not absorbed, the freight moves between the same point outside of Virginia as in the other case of the absorption, but a different industry in Richmond. The through movemer from origin to destination in the latter case is over the tracks of the same petitioner as line-haul carrier, but of a different switching carrier, or carriers, at Richmond, and, in most instances, via a different point of connection and interchange in said city, and the separately published tariffs of the line-haul and switching carrier, or carriers, in such case, taken together, provide for and govern the through transportation and total charges from origin to destination. The through route and service, when the charges are absorbed, are not the same route and service as when the charges are not absorbed, nor are the same through rates provided by the tariffs. The transportation service is not "like" in both cases, or over the same lines, or for the same distance, nor is it performed under substantially similar circumstances and condition within the meaning of said Section 2.

2.

The Court erred in denying the application and prayer of the petitioners for an interlocutory injunction and for a perpetual injunction to restrain the enforcement of the aforesaid order of the Interstate Commerce Commission.

3.

The Court erred in holding that the practice of petitioners, referred to in the aforesaid order of the Interstate Commerce Commission, from which it required petitioners to cease and desist, was, is, or ever has been contrary to the provisions of Section 2 of the Act to Regulate Commerce, or otherwise unlawful.

4.

The Court erred in approving the conclusions of the Interstate Commerce Commission on which its aforesaid order was based. Upon the facts, as to none of which there was or is any dispute, the Commission should have concluded, and the Court should have found and decreed as matter of law, that the said Section 2 is wholly inapplicable and that the service, where the absorption of the switching charges is refused as aforesaid, is not a like and contemporaneous service under substantially similar circumstances and conditions as that which is rendered when the switching charges are absorbed as aforesaid. The error in condemning the practice of the petitioners as violative of Section 2 of the Act to Regulate Commerce as aforesaid results in a denial of the right of the petitioners to make, or participate in, different rates to and from separate and distinct industries on separate and distinct railroads in Richmond.

BRIEF OF THE ARGUMENT.

I.

Section 2 Has no Application at All Except Where the Haul is "Over the Same Line, the Same Distance, Under the Same Circumstances of Carriage." (167 U. S., 512, 518.)

The sole question in this case is one of law, to-wit:

Whether or not the majority of the Interstate Commerce Commission (4 to 3) and the majority of the District Court (2 to 1) correctly construed and applied Section 2 of the Commerce Act.

Section 2 has been definitely and authoritatively construed by this Court, and it is settled that Section 2 has no application whatever except where,

The haul is "over the same line, the same distance, under the same circumstances of carriage."

Wight vs. U. S., 167 U. S., 512, 518.

I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144, 166-167.

For instance, let us assume that a railroad runs over the line as per diagram below:

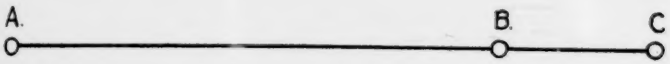
Under Section 2 of the Commerce Act as construed by this Court, it is settled that when a shipper sends goods from A to B, the railroad must transport the goods at the very same price for every other shipper, irrespective of competition or anything else, except dif-

ferences in "carriage" such as: whether the goods are transported in carload lots, or in passenger trains instead of freight trains, and things of that sort.

This Court so holds, for the reason that under Section 2 of the Commerce Act, every shipper must be treated exactly alike, when the transportation is "over the same line, the same distance, under the same circumstances of carriage."

167 U. S., 512, 518.
168 U. S., 144, 166-167.

Not so, however, when the transportation is from A through B to C, as per diagram below:



In that case, the haul is not "the same distance," but a greater distance, and Section 2 of the Commerce Act does not apply at all.

Therefore, the charge may be entirely different, or it may be the same, in so far as Section 2 of the Act is concerned.

One person may ship from A to B at a certain price.

Another person may ship from A, through B to C, and the price or charge may be different or the same as collected from the person who ships from A to B; but this is wholly immaterial under Section 2 of the Commerce Act, for the reason that the distance from A to C is not the same as the distance from A to B.

Section 2 of the Commerce Act, under the decisions of this Court, applies only when the haul is for "the same distance."

The moment the distance differs, Section 2 ceases to apply.

Furthermore, the moment the shipment is not "over the same line," Section 2 ceases to apply.

Furthermore, the moment there is a difference in "circumstances of carriage," Section 2 ceases to apply.

In the succeeding sections of this brief, we will deal more at length with the *Wight Case*, and in this connection we will contrast Section 2 of the Commerce Act with what is known as the English "Equality Clause" which is a part of Section 90 of the English "*Railway Clauses Consolidation Act, 1845,*" upon which Section 2 of our Commerce Act was modeled.

The English "Equality Clause" requires equality of charge in no case, except where goods pass "*only* over the *same portion of the line of railway,* under the same circumstances." (Italics mine.)

2 Ann. Rep.—I. C. C. (1888), p. 89.

In the *Wight Case*, this Court construed Section 2 of our Commerce Act as being equivalent to the English "Equality Clause."

The English "Equality Clause" has no application where the freight of one shipper, though carried over the same portion of the line, is carried a greater distance from a common point of departure, than the freight of another shipper. In such case, the freight carried the greater distance, would pass "over the same portion of the line" as the freight carried the lesser distance; but the freight carried the greater distance would also pass over an *additional* portion of the line, and therefore, the two shipments would not pass "*only* over the same portion of the line."

Law Rep., 21 Q. B. (1888), pp. 217, 218. *L. & Y. Ry. Co. vs. Greenwood.*

"It is evident that where goods pass "*only* over the same portion of the line," or "between the same points of departure and arrival," there cannot be any substantial dissimilarity of circumstances and conditions, so far as competition is concerned. Because, whatever competition may exist on that portion of the line, affects all shippers equally.

And if by reason of such competition, the railroad company sees proper to accept certain rates from one shipper, it must, by the express terms of the "Equality Clause" accept the same rates from any other shipper in respect to all goods of the same description, passing between the same points of departure and arrival.

Provided, of course, the circumstances of "carriage" are the same; that is, both shipments being carload shipments, or both shipments being less than carload shipments,—both shipments being made on freight trains instead of passenger trains, and things of that sort.

The English "Equality Clause" did not apply either where the points of departure were different, or where the points of arrival were different, or where the distances over which the goods were carried were different.

Law Rep., 21 Q. B. (1888), pp. 217, 218. *L. & Y. Ry. Co. vs. Greenwood.*

II.

THE WIGHT CASE.

Conclusive of Case at Bar.

The case of *Wight vs. United States,* reported in 167 U. S., p. 512, was an indictment under which Wight was convicted for violation of Section 2 of the Commerce Act.

The facts, as stated by this Court, are as follows:

> "F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburgh; he purchased his beer in Cincinnati in carload lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburgh, Cincinnati & St. Louis Railroad Company, known as the 'Pan-Handle,' and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-Handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-Handle Railroad for this service from Cincinnati to the warehouse was fifteen cents per hundred pounds. The station of the Baltimore & Ohio Railroad Company in Pittsburgh was at some distance from Bruening's warehouse, and there was no track connection between the Baltimore & Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore & Ohio route it was necessary to haul it in wagons from the Baltimore & Ohio station to the warehouse. The rate charged by the Baltimore & Ohio route between Cincinnati and Pittsburgh, on beer in carloads, was likewise fifteen cents per hundred pounds.
>
> "In the month of June, 1892, agents of the Baltimore & Ohio Railroad Company, subordinate to

the plaintiff in error, made an arrangement with Mr. Bruening, by which it was agreed that, if Bruening would ship his beer via the Baltimore & Ohio route from Cincinnati to Pittsburgh, the railroad company would make the same delivery at the door of his warehouse that was made by the Pan-Handle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterward, it was found that the cost to the railroad company for this hauling would be three and a-half cents per hundred pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him and continued in effect during the months of June, July, August and September, 1892. During these months Bruening made large shipments of beer in carloads via the Baltimore & Ohio route, paid the charge of fifteen cents per hundred pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for three and one-half cents per hundred pounds for the hauling. * * *"

"During the continuance of this arrangement with Bruening, as shown in the evidence, the Kaufman Brewing Company of Cincinnati made several shipments of beer in carloads by the Baltimore & Ohio route, on bills of lading in the form shown at pages 73, 74 and 75 of the record. Each of these shipments was consigned to the 'Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburgh, Pa., to order of shipper,' and was taken at the fifth-class rate of fifteen cents per hundred pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburgh, whose warehouse was near the station of the Baltimore & Ohio Railroad Company, but was not connected by track with any railroad. The bills of lad-

ing for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and on presenting it and paying fifteen cents per hundred pounds, received the beer, which he hauled to his warehouse at his own expense."

167 U. S., 513, 514, 515.

Mr. Justice Brewer, after stating the case as above, delivered the opinion of this Court, and it was held that under these facts, Section 2 of the Act had been violated.

At page 516, 167 U. S., speaking of the Baltimore & Ohio Railroad, Mr. Justice Brewer says:

"* * * and it delivered the beer to Mr. Bruening at its depot, and allowed him three and one-half cents per hundred for carting it to his warehouse. * * * During all this time it was carrying beer for Mr. Wolf from the *same place of shipment* (Cincinnati) to *the same depot* in Pittsburgh, and charging him fifteen cents therefor. * * * His warehouse was in a direct line 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent." (Italics mine.)

167 U. S., 512, 516.

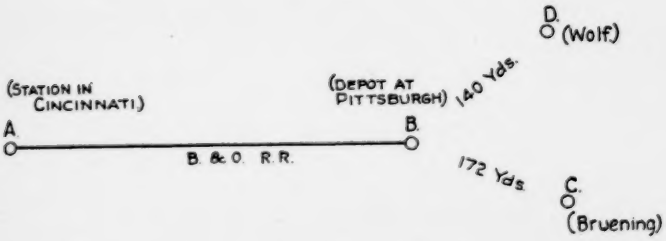
At page 517, Mr. Justice Brewer says:

"But the service performed in transporting from Cincinnati to the *depot at Pittsburgh* was precisely alike for each. The one shipper paid fifteen cents a hundred; the other, in fact, but eleven and a-half cents. It is true he formally paid fifteen

cents, but he received a rebate of three and a-half cents, and regard must always be had to the substance and not to the form." (Italics mine.)

Under these circumstances, the Court unanimously held that Section 2 was violated because the shipments to both Bruening and Wolf were "over the same line, the same distance, under the same circumstances of carriage," and Wolf paid 15 cents, whereas Bruening paid 11½ cents.

The following diagram illustrates the *Wight Case:*



The Baltimore & Ohio runs from point A, its station in Cincinnati to point B, its *depot* at Pittsburgh.

The Baltimore & Ohio had no switch track running to point C, 172 yards from its depot, where Bruening was located; nor did it have any switch track running from point B, to point D, 140 yards distant, where Wolf was located.

It hauled the goods from A to B only, and delivered the beer at exactly the same place, for both shippers; and as Mr. Justice Brewer says, on page 517:

> "The service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each."

Necessarily and clearly, Section 2 of the Act applied.

The Baltimore & Ohio could not and did not haul the goods through point B to point D, where Wolf was located.

It did not and could not haul the goods from A, through B, to C, where Bruening was located.

But it did haul the goods for both shippers from A, to its depot at B, or exactly "the same distance, over the same line, under the same circumstances of carriage."

III.

WIGHT CASE CONTINUED.

Conclusive of Case at Bar.

In the preceding section of this Argument, we have discussed the *Wight Case* at length, and have endeavored to show that this case specifically and positively decided.

There is another thing of extreme importance in the *Wight Case* having a conclusive bearing on the case at bar.

As we have already seen, the Baltimore & Ohio did not have any track connections at all, beyond its depot, with either the warehouse of Bruening or that of Wolf.

(167 U. S., 513, 514, 515.)

On the other hand, Bruening "had a siding connection" (167 U. S., p. 513) with the Pan Handle, and it extended the rate of 15 cents to deliveries of beer at his warehouse over this *extension of its line of railroad.*

The diagram below illustrates the situation from the Pan Handle standpoint:

The above diagram shows the Pan-Handle running from A, in Cincinnati to B, its freight depot at Pittsburgh; also its siding from B to C (Bruening's warehouse).

The Pan-Handle was never indicted for hauling beer from its station in Cincinnati (point A) to Bruening's warehouse at Pittsburgh (point C), although this haul was made through point B (its freight depot at Pittsburgh).

The Court never criticised the Pan-Handle for this, nor has the Government, nor was there any contention any where that this constituted a violation of Section 2 of the Act.

In fact, no such contention could be made, for the haul from A to C was not "the same distance" as the haul from A to B.

The points of arrival were not the same, but different.

This feature of the *Wight Case* is conclusive of the case at bar, and we respectfully submit that there is no violation of Section 2 where the railroad transports goods to a depot and ships them thence by switch track to a warehouse for the same price or a different price than was charged for the haul up to the depot only.

In such case the line of railroad is extended to the point of delivery and the distance is not the same, but greater.

IV.

SECTION 2 MODELED ON ENGLISH "EQUALITY CLAUSE."

Construed as Equivalent By this Court. Each Station is Point of Departure or Arrival; Not Entire City, District or Community.

We print in parallel columns Section 2 of the Commerce Act and such portions of the English "Equality Clause" as are material:

English Equality Clause; Sec. 90 Railway Clauses Act, 1845:	Section 2 of the Commerce Act reads:
"**Provided**, That all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; * * *" L. R. XI. App. Cases (1886) 97.	"* * * That if any common carrier subject to the provisions of this Act, shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic

> under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."
>
> Wight v. U. S., 167, U. S., 512, 513.

We have printed the English "Equality Clause" and Section 2 of the Commerce Act side by side, in parallel columns, for convenience, and because this Court has said:

> " * * * the second section of our Act was modeled upon Section 90 of the English 'Railway Clauses Consolidation Act' of 1845, known as the 'Equality Clause' * * *"
>
> T. & P. Ry. Co. vs. I. C. C., 162 U. S., 197, 222.

Again, in *I. C. C. vs. R. R.*, 220 U. S., 235:

> "It is not open to question that the provision of Section 2 of the Act to Regulate Commerce was substantially taken from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the 'Equality Clause' * * *. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the Act to Regulate Commerce, applies in construing the second section of that Act. * * *"
>
> I. C. C. vs. D. L. & W. R. R., 220 U. S., 235, 253-254.

So that the construction placed upon the English "Equality Clause" by the English Courts, governs and controls Section 2 of the Commerce Act.

Therefore, we will now discuss the leading English case construing the "Equality Clause."

The case to which we now refer is entitled "*Denaby Main Colliery Co. vs. Manchester, etc., Ry. Co. (1885),*" reported L. R. XI App. Cases, 97.

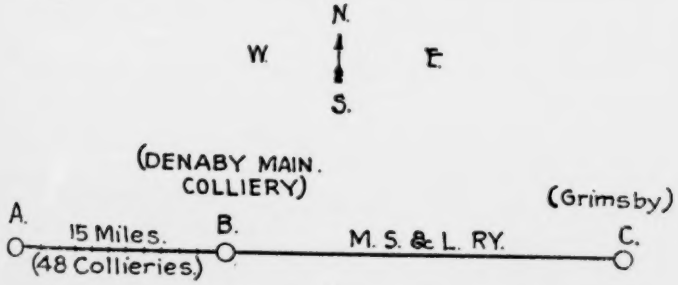
This case was decided by the House of Lords in 1885, and our Commerce Act was passed in 1887.

This case has been frequently cited by the Supreme Court with approval, and as controlling of the meaning of Section 2 of the Commerce Act.

It was cited with approval by this Court as directly in point with respect to the construction of Section 2 of the Commerce Act in the case of *I. C. C. vs. D. & L. W. R. R.*, 220 U. S., 235, 254.

It was twice cited with approval by this Court in the *Alabama Midland Case*, 168 U. S., 144, 164, 170.

It has been cited with approval by this Court in numerous other cases, which are unnecessary to mention.



The above diagram shows the situation in the case of the *Denaby Main Colliery Co., Ltd., vs. The Manchester, Sheffield & Lincolnshire Ry. Co.*, decided by the House of Lords December 17, 1885, L. R. XI. App. Cases, 97.

The facts pertinent to this phase of the case appear at pp. 104, 105, 106, XI App. Cases, and are as follows:

The Denaby Main Colliery was located at point B on diagram above, showing M., S. & L. Railway.

Between A and B,—a distance of 15 miles,—there were 48 collieries, all taking a group rate the same as from B, to various points of delivery such as C (Grimsby).

All the coal going east from the 48 collieries located west of B, passed the Denaby Main Colliery.

The Denaby Main Colliery Co. brought suit against the Railway Company for overcharges, because it collected the same price for hauling coal from B to C as it charged for hauling coal from A to C,—a greater distance by 15 miles,—and also from each of the collieries located between A and B, each of the collieries being a greater distance than from B to C.

That is, the complaint was that the railway company did more work for the same money for the other and more distant collieries, than it did for the Denaby Main Colliery Co.

It was alleged that this constituted unequal treatment, and the Denaby Main Colliery Co. claimed that this was a violation of the "Equality Clause" of the English Statute.

The House of Lords decided against this contention, and held that this was not within the "Equality Clause," and that same had no application at all, because the "points of arrival and departure" were not the same, each colliery being a place of departure located at a different point on the railway.

As to this question, the Syllabus reads as follows:

"The provisions in Section 90 of the Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) requiring equality of rates for carriage of goods 'passing only over the same portion of the line of railway under the same circumstances' applies only to goods passing between the same points of departure and arrival and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of the section.

"Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect to such carriage, and the owners of the colliery lying nearest the point of arrival brought an action for overcharges.

"*Held*, affirming in this respect the decision of the Court of Appeal, that the railway company had not infringed the provisions of Section 90 of the Railways Clauses Consolidation Act, 1845."

Denaby Main Colliery Co. vs. Ry., L. R. XI App. Cases (1886), 97.

In this case, the Lord Chancellor (Halsbury) in his opinion, says:

"I cannot think that the language of Section 90 of the Railways Clauses Consolidation Act of 1845 is susceptible of the construction put upon it by Mathew and Day, J. J. It seems to me that their construction strikes the word 'only' out of the section, and I agree with the Court of Appeal that, in order to bring the case within the language of the section, the termini both of arrival and departure must be the same."

Denaby Main Colliery Co. vs. Ry., L. R. XI App. Cases (1886), 97.

In this case, the House of Lords held that the "Equality Clause" had no application at all, even from the colliery nearest to point B when the haul was from said colliery to C, because the point of departure from said colliery was not the same as B, where the Denaby Main Colliery was located.

Notwithstanding that this colliery was "substantially equidistant" (Trans., 49) from the point of arrival (C) as complainant's colliery (B), the statute was held to be wholly inapplicable, because the distance was not exactly the same.

This distance must have been very small indeed, as the facts set out at pp. 104, 105, 106 XI App. Cases show that about 48 collieries were located on the railway within the 15 miles west of B.

Unfortunately, the map spoken of in the Report of the case as being in the record, is not reproduced in XI App. Cases, p. 97.

But it is said that on this map, the 48 collieries are shown in red, as located within the 15 miles of railway west of the colliery of the Denaby Main Colliery Co., and the points of destination or arrival are shown in blue.

No doubt if we had access to this map, we could ascertain exactly how far west of B (the colliery of the Denaby Main Colliery Co.) the nearest of the 48 collieries located within these 15 miles, actually was.

Inasmuch as there were 48 collieries connected with the railway in these 15 miles, the nearest one west of B must have been a very short distance indeed.

Nevertheless, in spite of the shortness of distance, the House of Lords held that the haul did not come within the "Equality Clause" at all, because the distance was not exactly the same as the distance from B to C.

This being the construction of the English "Equality Clause" and the same being controlling as to the construction of Section 2 of the Commerce Act, as has been repeatedly held by this Court, it is difficult to see how the haul by the Seaboard for one shipper from its station at Oxford, N. C., the point of departure to the interchange track of the Southern and Seaboard at Richmond, and the haul for another shipper from Oxford to its inter chage track at Richmond with the Southern and thence switched by the Southern to a point of arrival on the Southern tracks at Richmond comes within Section 2 of the Commerce Act; even though it were a fact that said point of arrival on the Southern were only a short distance from the interchange track of Southern Railway and Seaboard Air Line in Richmond. The same is true as to industry C, on the Chesapeake and Ohio.

Under the settled construction of Section 2, no matter how short the difference in distance may be, it is sufficient to remove the case entirely outside of Section 2; for, unless the haul is identically the same, Section 2 has no application at all.

Furthermore, it is still more difficult to perceive how the whole city of Richmond can be considered a single point of arrival within the meaning of Section 2, as is erroneously held by the majority of the Commission (See Trans., 49) and the majority of the District Court (See Trans., 76).

This insuperable difficulty impressed Woods, Circuit Judge, who in his dissenting opinion, uses the following language:

> "The view of the majority of the Commission is that to make a distinction in switching charges at Richmond or any other city, based on competi-

tion between rival lines, is to violate Section 2 of the Act. But that section was intended to enforce equality to shippers over the same line, and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, and under the same conditions of carriage are compelled to pay different prices therefor. I. C. C. v. Alabama, etc. R. R., 168 U. S., 144, 166. Hence the conclusion of the majority of the Commission must necessarily rest on the proposition that a shipment over any road into Richmond has reached its railroad destination as soon as it reaches the railroad's terminal in Richmond, and the transportation by any road over its rails to the consignee is not a separate transportation on another line but a mere incident of delivery, and that therefore all industries on any of the other roads must be put on a basis of equality without respect to competition. This conclusion was reached on the theory that the decision in the case of *Wight vs. U. S.*, 167 U. S., 512, is inconsistent with the practice of the Interstate Commerce Commission sanctioning the custom of railroads in making switching service a separate tariff item. I think it clear that this case has no such bearing."

Trans., p. 80.

"If transportation to Richmond is to be regarded as unitary and the delivery to different industries on tracks of the different roads merely incidental to delivery in Richmond and not a separate item of carriage, then all switching charges must be put on the same basis under Section 2. On the other hand, if the law contemplates that the carriage to the depot of each railroad in Richmond or to an industry on its own switch is to be regarded as a transportation to one destination, and transportation from the depot of each railroad to an industry on the switch of another rail-

road is to be regarded as a separate act of transportation on another road to its ultimate destination, then the switching charges to industries on the different railroads may be charged differently under Section 3, provided the difference is reasonable and founded on substantial difference in conditions; and in determining whether there is a substantial difference in conditions the fact of competition may be taken into estimate under that section."

Trans., p. 79.

Under the construction of the English "Equality Clause," where,—to use the language of the Lord Chancellor,—"in order to bring the case within the language of the section, the *termini* both of *arrival and departure* must be the same," there can be no room whatever for the confusion of thought and the erroneous view, that an entire city can be a point of arrival or a point of departure, in the sense of Section 2 of the Commerce Act.

In the *Wight Case,* Mr. Justice Brewer, in announcing the opinion of this Court, scrupulously avoids any such error. He does not speak of the entire city of Pittsburgh as a point of arrival, but he distinctly uses the word "depot" as the point of arrival.

His language is as follows:

"But the service performed in transporting from Cincinnati to the *depot at Pittsburgh,* was precisely alike for each."

Wight vs. U. S., 167 U. S., 512, 517.

Again at page 516, he says, "*the same depot* in Pittsburgh."

167 U. S., 512, 516.

This Court, in the *Wight Case,* is equally as clear and specific when it uses the word "*depot*" as is the Lord Chancellor in the *Denaby Case,* when he says, "the *termini* both of arrival and departure must be the same."

It is judicially known to this Court that cities like Chicago and New York occupy immense areas, including many square miles.

It would be absurd to hold that Section 2 of the Act covered the whole of the city of New York, or the whole of the city of Chicago, as a single point of arrival or a single point of departure, in the sense of Section 2 of the Commerce Act.

There are numerous "depots" in Chicago and in New York, and many termini of arrival and departure" in Chicago and New York.

So it is with the city of Richmond, which occupies a large area.

Indeed, the map in this case (Trans., Ex. A.), showing the city of Richmond and the interchange tracks of the various railroads, discloses that an extensive territory is covered.

It also shows that the city is divided by the James River,—a wide and difficult body of water,—and that some of the depots and termini of the railroads in this case are located on one side of the river and some on the other.

When freight is hauled from Oxford, N. C., to any one of the different industries located on the tracks of the different railroads in Richmond, it reaches very many different points widely separated, and the distances are not the same, and the termini of arrival and departure are not the same, and Section 2 of the Act has absolutely no application whatever.

V.

Section 2 and Its Equivalent, English "Equality Clause" (Continued). Each Station Is Point Departure or Arrival; Not Entire City, District or Community.

In the preceding section of this argument, we have seen that the House of Lords held in the *Denaby Main Colliery Case* that every separate one of the forty-eight colleries, located within the distance of fifteen miles on the railway, constituted a distinct and separate point of departure, and that a haul did not come within the "Equality Clause" unless it was from the same point of departure, to the same point of arrival. In other words, the forty-eight collieries could not be grouped as one point of departure, but each colliery was a separate and distinct point of departure under the "Equality Clause."

And before the "Equality Clause" could have any application whatsoever,—

> "the termini, both of arrival and departure, must be the same."
> L. R. XI App. Cases, 97.

This *Denaby Main Colliery Case* involved points of departure. We will now consider a case involving points of arrival.

In the case of *Murray vs. G. & S. W. Ry. Co.* (1884), XI Sc. Ses. Cases (4th Series), 205, the question was as to whether the 83d Sec., Railway Clauses Consolidation (Scotland) Act of 1845 had any application at all to the facts of the case.

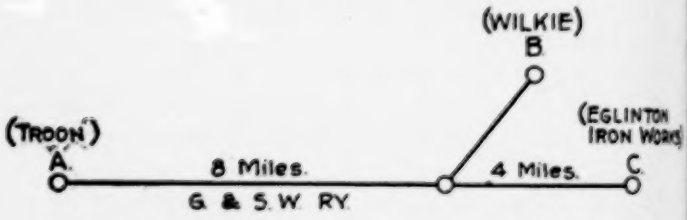
This Scottish Act contained a clause reading: "pass-

ing only over the same portion of the line of railway under the same circumstances."

It will be noted that this is the identical language contained in the English "Equality Clause," Sec. 90 of the Railways Clauses Consolidation Act of 1845 (8 and 9, Vict. c. 20), which was construed in the *Denaby Main Colliery Case*.

It is not surprising, therefore, to find that the same construction was placed upon the Scottish Act by the Court.

The following diagram illustrates the *Murray Case*:



The above distances are taken from the statement of the case made in the Report.

It will be noted that they are short distances and practically involve a switching movement.

The statute applies to all distances, whether the same are short or long, but it never applies unless the distances are exactly the same.

In this case, the Court states that one Wilkie had numerous shipments of limestone made to him over the railway from Troon.

The shipments moved 8 miles from Troon (point A on the diagram), to and through the point of connection with Wilkie's private siding, and were thence carried to his works at point B.

The Eglinton Iron Works also had numerous shipments of limestone made from Troon to them, at point C., which was 4 miles beyond the point of connection of Wilkie's siding with the G. S. & W. Ry.

He complained that the railway charged him more to haul the limestone to his place of business at B., than it did to haul the limestone to the Eglinton Iron Works at C.

Wilkie assigned his claim to one Murray, who brought suit.

The Court says:

> "Now the pursuers' averments in this matter are as follows: 'the said traffic passed over the same line of railway as the said John Wilkie's traffic over as far as the point of connection with the private branch leading to said John Wilkie's works, and a distance of about four miles further.' * * *"

The Court decided that, the distances of the respective hauls not being the same, and the point of departrue and arrival not being the same, the statute had no application whatever, the Syllabus reading:

> "*Held*: That to justify proceedings under that section by a person complaining of an undue preference in the rates charged to another trader, the goods of the two traders must be carried on precisely the same journey from the same place and to the same place."
>
> *Murray v. G. & S. W. Ry. Co.* (1884), XI Sc. Ses. Cases (4th Series), 205.

This is an extremely apt case with respect to the situation in the case at bar.

Here we have what the majority of the Commission calls the "line-haul" (Trans., 49), identically the same for both shippers up to the point of connection of Wilkie's private siding with the G. & S. W. Ry. At page 49 of the Transcript, the majority of the Commission says:

> "• • • where the industries are located within the switching district of the same city and are substantially equidistant from the respective interchange tracks, we are of the opinion that the service which the line-haul carrier renders, whether the traffic is ultimately destined to industry B or industry C, is like service within Section 2. It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and does not those of another."
>
> Maj. Op. Comm., Trans., 49.

This was precisely the complaint of Wilkie, who said the G. S. & W. Ry. obtained greater compensations from him than it did from the Eglinton Iron Works, and precisely the construction of the statute which he urged.

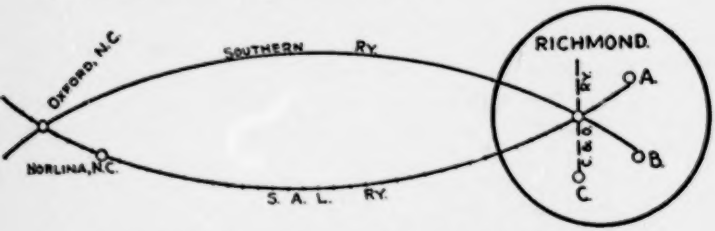
But the Court held that this was an erroneous construction of the statute, and that before the statute could have any application at all —

> "the goods of the two traders must be carried precisely the same journey, from the same place and to the same place."

The distances involved in the *Murray-Wilkie Case* were very short, but that made no difference whatever in the application of the statute.

Let us, for the moment, refer to the diagram used by the Commission in the case at bar, and match same up with the *Murray-Wilkie Case*.

The Commission's diagram is reproduced below, from page 46 of the Transcript:



This diagram is inaccurate, as we have shown in our Statement of the Case; but for the present, we use it, so that it can be compared with the situation in the *Murray-Wilkie Case*.

At page 46 of the Transcript, the Commission says:

> "The precise point is best illustrated by a practical example. The accompanying diagram shows the situation. Oxford, N. C., is a point reached by both the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is a local point on the Seaboard. Assume the industries A., B. and C. on the Seaboard, the Southern and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to Industry B., on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C., on the Chesapeake & Ohio, the Seaboard refuses to absorb the

Chesapeake & Ohio's switching charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

Trans., 46.

At page 46 of the Transcript, the Commission says:

"* * * we are of the opinion that the present practices of the carriers serving Richmond are unlawful within Section 2 of the Act.

"Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, the complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service on the terminal tracks of the Chesapeake & Ohio."

Trans., 46.

Now we respectfully submit that a simple inspection of the Commission's diagram shows that when traffic is hauled from Oxford, N. C., to point B. on the diagram, and traffic for another shipper is hauled from Oxford, N. C., to point C. on the Commission's diagram, the termini of arrival are not the same, but different, just exactly as in the *Murray-Wilkie Case.*

This is self-evident.

And, as the Court said in the *Murray-Wilkie Case*, before the statute can apply at all,—

> "The goods of the two traders must be carried on precisely the same journey, from the same place and to the same place."
> *Murray v. G. & S. W. Ry. Co.* (1884) XI Sc. Ses. (4th Series), 205.

This is patent and obvious from the diagram of the Commission itself.

It would be even more patent and obvious, if possible, were the diagram correctly drawn, as we have shown in our Statement of the Case.

Perhaps this failure of the Commission to recognize the admitted facts as they are, has a good deal to do with the confusion of thought which has led to the total misconstruction and misapplication of Section 2 of the Commerce Act.

In so far as Section 2 of the Act is concerned, when it applies at all, it applies whether the distances are short or long, as is well illustrated in this *Murray-Wilkie Case*, where the total distance involved was about 12 miles, 8 being line-haul and the rest switching.

In so far as Section 2 is concerned, whether the distance be short or long is wholly immaterial; but it is vital that the distance be the same, and unless it is the same, Section 2 has no application whatever.

At page 47 of the Transcript, the majority of the Commission says:

> "Section 2 is primarily directed against discrimination between shippers located in the same *community*. It is aimed to put all shippers within a *switching district* upon a substantial equality." (*Italics mine.*)
> Maj. Op. Comm., Trans., 47.

The *Murray-Wilkie Case* and the *Denaby Main Colliery Case* show that this view is wholly erroneous.

In the *Denaby Main Colliery Case*, each one of the 48 collieries located within a distance of 15 miles, was held by the House of Lords to be a separate point of departure.

In the *Murray-Wilkie Case*, each of the iron works owned respectively by Wilkie and Eglinton Iron Works Company,—one on a private siding and the other only 4 miles from the point of connection with the private siding,—were held by the Court not to be the same place of arrival within the terms of the statute, but to be separate and distinct places of arrival, taking different hauls, although from the same point of departure, thus removing the case entirely outside of the statute.

This construction has been definitely adopted, and applied by this Court to Section 2 of the Commerce Act; and in its decision in the *Wight Case*, 167 U. S., 512, at page 517, it says accurately and clearly that the point of arrival in that case was "the depot at Pittsburgh," and at page 516, "the same depot at Pittsburgh."

The Court did not consider that the whole of Pittsburgh was the point of arrival, as the majority of the Commission holds with reference to the case at bar.

Furthermore, upon reading Section 2 of the statute, it will be observed, and it is well to note, that nowhere does this section speak of a "community" or a "district."

Anything resembling these words will only be found in Section 3 of the statute, where the word "locality" is used.

But the case at bar is held by the Commission not to come within Section 3. (Trans., p. 46.)

Besides, it should always be remembered that this Court has frequently held that "the purposes of the several Sections are different."

I. C. C. v. *Ala. Mid. Ry.*, 168 U. S., p. 144, 166.

Their history, object, phraseology and effect are entirely different, and the words of one section cannot be transplanted to another.

We will now call attention to another important English case,—that of *L. & Y. Ry. Co. vs. Greenwood*, L. R. 21 Q. B. (1888), page 215.

In that case, the following language appears:

> "Now before that Act was passed in the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), S. 90, there was a provision requiring that the company should charge equal rates, but that had been construed by the courts to mean equal rates for the carriage of goods over the *same portions* of the line, so that, if there was a charge from A. to B. which was equal to all persons sending goods from A. to B., no objection could be raised to that under S. 90 of the Railway Clauses Consolidation Act, but if a particular person, X, was charged so much for the carriage of his goods from A. to B., and another person, Y, was charged less, then there was an inequality within the meaning of S. 90 of the Railway Clauses Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him. Where, however, the *places* over which the goods were carried were not the same, as for instance, where there was a charge of so much from A. to B., and of so much from B. to C., then, although the charges might be the same, while the distances were only half in one case what they

were in the other, yet that was not an inequality within S. 90 of the Railway Clauses Consolidation Act."

The above is so clear that nothing can be added to it by way of explanation.

These three English cases which we have discussed, —that is, the *Denaby Main Colliery Case*, the *Murray-Wilkie Case* and the above *Greenwood Case*, show conclusively that Section 2 of the Commerce Act has no application whatever to the case at bar; and the *Wight Case*, 167 U. S., 512, together with *Alabama Midland Case*, 168 U. S., 144, 166, shows the same thing.

VI.

Each Station Is Point of Departure or Arrival; Not Entire City, District or Community. (Continued.)

The *Chicago Stock Yards Cases* (186 U. S., 320 and 215 U. S., 98), involved a controversy as to reasonable charges under Section 1; but they have an important and conclusive bearing on the point as to whether or not the stations or depots of railroads are separate and distinct places of arrival, or whether an entire city, district or community must be considered as a "unitary" terminus.

These cases settle that each railroad station is the terminus or point of arrival, and not the entire city of Chicago.

At page 104, 215 U. S., Mr. Justice Brewer says:

> "The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in I. C. C. vs. C. B. & Q. R. R. Co., 186 U. S., 320."
> 215 U. S., 98, 104.

Mr. Justice Brewer takes pains to quote from the tariffs. At page 107, 215 U. S., he states:

> "We quote the schedule of the Chicago & Northwestern Railroad Company: 'The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at or received and transported from the stock yards of the company at Mayfair in Chicago. Upon all live stock consigned to or from the Union Stock Yards in Chicago or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to

> or received and transported from said Union Stock Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of $2.00 per car will be made for the special and separate service of transporting such cars to said Union Stock Yards, or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails.'
>
> "The others are equally specific. In some of them as in those of the Atchison, Topeka & Santa Fe Railway Co., it is provided: 'The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be Two Dollars ($2.00) per car less than when delivered at the Union Stock Yards at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live stock contract must then be filled out so far as to show the correct destination and rate as provided by the tariff and amendments.'"

Nowhere in the opinion is it suggested that Chicago is the single terminus of the line-haul roads.

On the contrary, it is clearly recognized and decided that the station and stock yards of the Chicago & Northwestern Railroad Company located at Mayfair in Chicago is the terminus of that railroad.

And it is perfectly lawful for that railroad to deliver stock at its station at Mayfair for one price, whereas when it delivers stock at the Union Stock Yards in

Chicago, $2.00 extra per car is charged, notwithstanding the point of origin is the same as to both shipments.

So again, it is distinctly recognized and decided that the terminus of the Atchison, Topeka & Santa Fe Company is at its own yards at Corwith in Chicago, and that it is perfectly lawful for that railroad to deliver stock at that terminus for $2.00 per car less than it charges when the delivery is made at the Union Stock Yards.

In other words, it was never dreamed by anyone that the whole city of Chicago was the single terminus of all these railroads, and that the same charge from a common point of departure, must be made to Chicago as a "community" or "unitary" proposition.

Not only did this idea fail to occur to anybody at all, but this Court held that the railroads entering Chicago had a perfect right to deliver at their own stations for a rate $2.00 per car less than they delivered at the Union Stock Yards.

And this Court went still further and ruled distinctly that the $2.00 charge, or any charge made for delivery at the Union Stock Yards, should include profit in addition to cost, as guaranteed by the constitution of the United States.

The ruling of the Commission below was reversed on this point.

Furthermore, this *Stock Yards Case* in 215 U. S., 98, decides that it is perfectly lawful for carriers to waive the switching charge, a proposition that is denied by the majority opinion of the Commission in the case at bar, and the majority opinion of the District Court.

This is true in effect, for they say the whole city, or "switching district," must take the same rate, whereas

in the *Stock Yards Cases,* this Court decided that it is perfectly lawful to charge nothing for delivery at some stations, and at the same time to charge $2.00 extra for delivery at other stations, all being in Chicago.

At page 105, 215 U. S., we find Mr. Justice Brewer, in delivering the opinion of this Court, using the following language:

> "The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."
> 215 U. S., 98, 105.

This is true, whether the switching is done by the carrier on its own rails, or whether it procures another carrier to do the switching for it.

This feature was not overlooked by Mr. Justice Brewer, for at the same page (105, 215 U. S.), he says:

> "For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co.* vs. *St. Louis Hay Co.*, 214 U. S., 297."
> 215 U. S., 98, 105.

So that a carrier may waive not only switching charges for such service done on its own rails, but it may waive such charges when done by another carrier whom it procures to perform the service.

> "Business interests may justify it in waiving such a charge, * * *"

says Mr. Justice Brewer.

That is, the interests of Commerce may so justify it.

This Court has frequently decided that the Commerce Act was intended to promote and facilitate commerce.

162 U. S., 197, 219.

At any rate, in these *Stock Yards Cases*, it is distinctly held that a carrier may waive terminal or switching charges in the interests of business and commerce.

From the foregoing, we see that this Court has decided that the separate termini of the several railroads in Chicago, at which the various industries are located, are the points of arrival in Chicago; and that the entire city of Chicago is not the single terminus of all the railroads entering Chicago.

This Court holds that it is where the delivery is made to the consignee that the journey is ended.

When the delivery is made at the separate terminus owned by a railroad, that is the point of arrival, and that is where the journey is ended.

Where the delivery is made by some switching line, or some other railroad, the point of delivery where the industry is located is the end of the journey and the point of arrival.

This *Stock Yards'* decision further holds that one charge may be imposed by a carrier when delivery is made to an industry located on its own line, and a different charge may be made to an industry located on a switching line not owned by the railroad. That is, the charges need not be the same.

And the fact that the stations are all in the same city or switching district is of no moment whatever.

VII.

Admitted Facts Show That Hauls Are for Totally Different Distances, to Wholly Different Points of Arrival.

> "So far as the Southern Railway is concerned, its service from Oxford to Richmond is in the same direction over the same rails and is precisely 'identical' for a delivery at Richmond to an industry on the Seaboard with a delivery at Richmond to an industry on the Chesapeake & Ohio."
> Concurring Op., Comm. Harlan, Trans., 51.

We devote a separate section of this brief to the above extract, so as to give special prominence to it.

For it is typical of the vital error in this case. It is one of the things at the very heart of the case.

The statement made in this extract is wholly erroneous, and directly contrary to the admitted facts, and it is one of the fundamental reasons for the misapplication of Section 2 in this case.

Commissioner Harlan has been misled, unwittingly of course, by the symmetry of the Commission's inaccurate diagram appearing at page 46 of the Transcript.

The other three members of the majority of the Commission have likewise been misled by their own diagram.

The whole "substantially equidistant" theory is based on this fallacy.

We have touched on this feature in our Statement of the Case.

It is most important for appellants to clear the atmosphere of this error, for it will then be self-evident that Section 2 has no application at all.

Let us, therefore, examine this extract from Commissioner Harlan's concurring opinion.

Let us trace the haul over the Southern from Oxford, and see whether or not it "is in the same direction over the same rails and is precisely 'identical' for a delivery at Richmond to an industry on the Seaboard with a delivery at Richmond to an industry on the Chesapeake & Ohio."

By reference to the Map (Ex. A) immediately following page 20 of the Transcript, and to Section 1 of the petition (Trans., 3 and 4) explaining same, we see that when the Southern brings a car from Oxford, N. C., for delivery to an industry on the Seaboard, it is hauled to the interchange tracks of the Seaboard at a point marked by red letter E, located in Manchester or South Richmond, South of the James River, and there turned over to the Seaboard, which switches it thence for delivery to the industry; and in case the industry is North of the James River, the Seaboard hauls it over its bridge, on its own rails, across the river, sometimes several miles, to the industry.

Now when the Southern brings a car from Oxford, N. C., destined for delivery to an industry on the Chesapeake & Ohio Railroad in Richmond, it does not come to point E at all. The Chesapeake & Ohio does not reach E in South Richmond. All the tracks and depots of the Chesapeake & Ohio are North of the James River. The Southern could not deliver a car to the Chesapeake & Ohio at E, because the C. & O. is not there.

So the Southern takes this car by a totally different route or line.

In coming up to Richmond with this car from Oxford, North Carolina, it turns off long before it gets to

point E, in South Richmond, and never goes there at all.

After turning off, it crosses its long and expensive bridge over the wide and difficult James River, to the North side of that body of water.

When it gets across the river to the North side, it goes underneath (as indicated by the broken red line of the Southern on the Map, Ex. A), the concrete viaduct upon which the Chesapeake & Ohio's rails reach this part of Richmond, near a point where the concrete viaduct emerges from the waters of the James River, which water it traverses for a considerable distance.

Then the Southern makes a curve to the Northeast, goes underneath the viaduct of the Chesapeake & Ohio again, then goes underneath the bridge of the Seaboard Air Line, proceeds on its way, almost parallel with banks of the river, turns Northeast passes over second bridge (a draw bridge) underneath the viaduct of the Chesapeake & Ohio for the third time, turns and proceeds Southeasterly parallel with the viaduct of the C. & O., then turns Northeasterly and crosses underneath to overhead bridge of the C. & O., then proceeds Northeasterly parallel with the C. & O., and finally reaches the interchange tracks of the Chesapeake & Ohio at a point marked by red letter F, on the Map, Ex. A.

The Southern then delivers the car to the C. & O., its connection which then switches it by a series of complicated movements, for delivery to the consignee, who in many instances is many miles away.

The distance is approximately 3 miles from point E, where the Southern interchanges with the Seaboard in South Richmond, and point F, North of the river,

where the Southern interchanges with the Chesapeake & Ohio.

Is there anything "identical" about these two hauls?

We again quote from Commissioner Harlan's concurring opinion:

> "So far as the Southern Railway is concerned, its service from Oxford to Richmond is in the same direction over the same rails and is precisely 'identical' for a delivery at Richmond to an industry on the Seaboard with a delivery at Richmond to an industry on the Chesapeake & Ohio."
> Trans., 51.

For the above reasons, Mr. Commissioner Harlan concurs with the majority of the Commission that—

> "* * * where the industries are situated within the switching district of the same city and are substantially equidistant from the respective interchange tracks, we are of the opinion that the service which the line-haul carrier renders, whether the traffic is ultimately destined to industry B or industry C, is like service within Section 2."
> Maj. Op. Comm. Trans., 49.

The letters, B and C, have reference to the Commission's symmetrical inaccurate diagram on page 46 of the Transcript.

Can it be possible that a statute like Section 2, which has no application at all, unless the haul is "over the same line, the same distance, under the same circumstances of carriage" (167 U. S., 512, 518) is violated by the two hauls of the Southern above described?

Does "precisely identical" service consist of hauls

for different distances, varying many miles one not crossing the river and the other crossing the river over steel bridges and then undulating beneath concrete viaducts?

Do hauls to different places, many miles apart, one on the South side of a great river, and one on the North side, violate a statute that has no application at all, except where the two hauls are between the same points of departure and arrival?

Can a haul over a different part of a line violate a statute that has no application at all, except where the haul is over the same portion of the line?

The majority of the Commission answers in the affirmative, and refers to letters B and C, on a symmetrical diagram showing a single interchange track by and between three railroads in Richmond,—a spot that does not exist.

It might be well to say that the hauls to and from the several interchange tracks of the other railroads in Richmond, are equally as tortuous, complicated and long as those above described, and none of them are for the same distance, over the same line, under the same circumstances of carriage.

VIII.

"Transportation" Defined. Switching Is Transportation. Not Same As Drayage.

The majority of the Commission seek to draw a distinction between the line-haul and the switching service, and intimate that the line-haul is transportation, whereas the switching service is not.

(Trans., p. 49).

Commissioner Harlan in his concurring opinion, elaborates on this and goes so far as to say that the switching service is the same as "a horse and cart."

(Trans., pp. 51, 52.)

The majority of the District Court also seemed to be particularly taken with this view, and cite at considerable length from Commissioner Harlan's concurring opinion.

(See Trans., p. 77.)

It will not be necessary to dwell upon this at any length, for this Court has decided that switching is transportation, and also that when empty cars begin to move from a switch track on a journey to another State, the "switching movement constitutes a part of interstate commerce."

Ill. Cent. v. La. R. R. Comm., 236 U. S., 157.

The Commerce Act, itself, defines switching as "transportation." Section 1 of the Act, as amended June 18, 1910, reads as follows:

> "The term 'railroad' as used in the Act, shall include all bridges and ferries on or operated in

connection with any railroad company, and also on the road in use by any corporation operating a railroad company, whether owned or operated under a contract, agreement, or lease, and shall also include all *switches, spurs, tracks,* and *terminal facilities* of every kind *used* or *necessary* in the *transportation* of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the *transportation* or delivery of any of said property; and the term '*transportation*' *shall include* cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use use thereof and *all services in connection with the receipt, delivery, elevation* and *transfer in transit,* ventilation, refrigeration or icing, storage or *handling* of *property transported;* and it *shall be the duty* of *every carrier* subject to the provisions of this Act to *provide and furnish such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through rates and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used thereon, and for the operation of such through routes, and providing for reasonable combination for those entitled thereto." (Italics mine.)

(See *U. S. Stat. At Large,* Volume 36, page 539.)

It is idle to argue that switching is the same as drayage.

Switching is a part of railroad "transportation" and drayage is not and never has been. Drayage is an accessorial service and the whole history of cartage and drayage appears in the opinion of this Court and the

Court below, which was affirmed in the case of *I. C. C.* vs. *D. G. H. & M. Ry. Co.*, 167 U. S., 633.

Amongst other things, the Court, in that case, says, with respect to the Fourth Section question involved:

> " * * * the Fourth Section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail * * *."
> (167 U. S., 644.)

This is likewise true of Section 2.

IX.

Switching is Railroad Transportation; Not Drayage. (Continued.)

The following appears at page 77 of the Transcript in the opinion of the majority of the Court below:

> "Commissioner Harlan, in his concurring opinion, referring to the Wight Case, among other things, says:
>
> 'As I have understood it the Court there lays down the broad general doctrine that, as between two shippers at the same rate point competition between carriers does not excuse or justify a discrimination of the character condemned as unlawful under Section 2 of the Act. And a careful reading of the case seems not to permit of the suggestion that the Court could have reached just the opposite conclusion, if, instead of a horse and cart, the Baltimore & Ohio had hired a switching line to deliver the traffic to the industry on the rails of its competitor, and had thus accomplished, merely by the use of different facilities, precisely the same discrimination which, in the case under discussion, was declared unlawful.' "
>
> Trans., 77-78.

This passage seems to have had great weight with the majority of the District Court. It, therefore, deserves some analysis.

Commissioner Harlan is right in saying that when Section 2 applies at all, competition between carriers cannot be considered.

He might have gone further and said that no sort of competition could be considered, whether between carriers, or between markets, or between product and

product, or competition of any kind or description whatever.

That is what the *Wight Case* decided clearly and definitely.

And such is the law when Section 2 applies; but Commissioner Harlan loses sight entirely of the main point. The crucial and important question in the *Wight Case* and in the case at bar, and in every case involving Section 2 is whether or not it applies at all.

That is the first thing to be determined.

It is time enough to discuss the question of discrimination *after* it is ascertained whether or not the statute applies at all.

To do so before we have found this out is most confusing, and puts the cart before the horse, so to speak, which Commission Harlan seems to have done.

So let us take up this preliminary question and find out whether Section 2 applies at all to the case at bar.

Now, this Court, in the *Wight Case*, leaves us in absolutely no doubt as to what circumstances must exist by which it can be ascertained whether or not Section 2 applies at all.

These circumstances are distinctly stated by Mr. Justice Brewer, who says the two shippers must ship "over the same line, the same distance, under the same circumstances of carriage."

When these three things occur simultaneously, then competition has no place in the picture at all, no matter what kind of competition it is.

Unless these three things do occur and exist simultaneously, Section 2 has no application at all.

So our first inquiry is:

Are the hauls in the case at bar "over the same line?"

We must answer this question in the negative, on account of the fact that, the haul from Oxford, N. C., for example, is over a different line or route of the Southern, when destined to an industry on the C. & O., from what it is when destined to an industry on the Seaboard. In the one case, the Southern turns off and crosses its bridge to the North side of the river, and in the other case, it pursues a totally different course or line, to a point of interchange on the South side of the river.

We have given all the details of these hauls in a prior section of this brief, and will not repeat them here, but refer to Section VII.

So it is with all the hauls in the case at bar under the admitted facts.

This, in itself, takes the whole case out of Section 2.

We need to inquire no further, but as it will take but little time, let us go on very briefly.

Our second inquiry, then, is:

Are the hauls for "the same distance?"

This question must also be answered in the negative. For example, the haul from Oxford over the Southern to an industry on the C. & O., is a totally different distance than is the haul to an industry on the Seaboard. Indeed, the haul to the interchange tracks of the Southern and the C. & O., on the North side of the river, is for a totally different distance than is the haul of the Southern to its point of interchange with the Seaboard on the South side of the river.

We have gone over all this in detail in a previous section of this brief, and will not elaborate here, but refer to Section VII.

Again we say the fact that the distances are not the same, takes the case out of Section 2 without more.

But let us complete our tests.

Our third inquiry is:

Are the "circumstances of carriage" the same?

This question must be answered in the negative, because it is manifest that a haul across a high, steel bridge, over a great river, where speed and weight of trains and engines must be limited, and a haul under a concrete viaduct, constitues different circumstances of carriage from a haul on solid earth.

The haul to the industry on the C. & O. involves crossing the River James, on a bridge, and involves going underneath the concrete viaduct of the C. & O., whereas the haul to the Seaboard interchange track does not.

This takes the case at bar at once out of Section 2 without more.

The statute being wholly inapplicable, obviously it is needless to discuss the question of the "horse and cart," or discrimination.

Doubtless, we should leave the matter here, but out of abundance of caution, we point out that the Act, itself, specifically states that it applies to carriage by *railroad*, and does not mention drayage.

In Section 1 of the Act, it states that it applies "to any common carrier engaged in the transportation of passengers or property wholly by *railroad* (or partly by railroad or partly by water when both are used under a common controlled management, etc.)."

The Act does not say a word about drayage, but applies to railroads; and when this Court, in the *Wight Case*, says that before Section 2 can apply at all, the haul must be "over the same line," it means over the same line of railroad, and can mean nothing else. In fact, in the *Alabama Midland Case*, 168 U. S., in speak-

ing of Section 2, the Court uses the term "same road." (168 U. S., 144, 167.)

In the *Cartage Cases*, largely involving the Fourth Section, this Court held that drayage was not rail transportation, but simply an accessorial service, and that the Commerce Act applied only to rail transportation. That when passengers and property reached and were discharged from the cars at the railroad company's warehouse or station at Grand Rapids for the same charges as those received for similar service at Ionia, the duties and obligations cast upon the railroad company were fulfilled and satisfied.

> "The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles or by those furnished by the railway company, would not concern the Interstate Commerce Commission."
> *I. C. C.* vs. *D. etc. Ry. Co.*, 167 U. S., 644.

In the *Wight Case*, this Court did not decide that Section 2 was violated because the Baltimore & Ohio hired a "horse and cart."

The Court decided that the *Wight Case* came within Section 2 of the Act, because the railroad transportation from Cincinnati to the depot of the Baltimore & Ohio at Pittsburgh was a haul "over the same line" of railroad for "the same distance, under the same circumstances of carriage."

That is the distinct and fully and clearly expressed reason given by the Court for the decision in the *Wight Case*.

And it is in accord with all the decisions of the English courts.

The law was not concerned with what became of the goods after they left the depot, as was said by this Court in the *Cartage Cases*, 167 U. S., 633, 644, it was concerned with the observation of Section 2 of the Act with respect to the transportation from Cincinnati to the depot at Pittsburgh over the railroad running between those two points.

And, inasmuch as the transportation between those two points was identically the same for both shippers, Section 2 applied.

And as soon as Section 2 applied, both shippers were obliged to be treated exactly alike.

One shipper could not be charged 15 cents and the other 11½ cents for the same haul, from Cincinnati to the depot at Pittsburgh, by the same railroad, for the same delivery.

This is what the *Wight Case* decided.

This drayage sophism was pressed upon the Court, as Mr. Justice Brewer points out; but it was rejected, and his answer was as clear as such a master of lucid English and lucid thought could make it.

Mr. Justice Brewer says:

> "But the service performed in transporting from Cincinnati to the *depot at Pittsburgh* was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but eleven and a half cents. It is true he formally paid fifteen cents, but he received a rebate of three and a half cents, and regard must be had to the substance and not to the form."
>
> 167 U. S., 512, 516.

How can anyone be in doubt as to what was decided in the *Wight Case*, in the face of this clear, unmistakable language?

The railroad was convicted for charging two shippers differently for the identical service, between the same two points.

It was not convicted for extending its rails beyond its depot, and thence switching or transporting on its rails, the goods of one shipper, and delivering the goods after this additional rail haul, to his warehouse, instead of at its depot, at a different price from that charged to another shipper who took delivery at the depot after a shorter haul from the same point of origin.

It could not have been so convicted under Section 2, for the services would not be the same. The journey would not be precisely the same, from the same place and to the same place.

It is clear that Commissioner Harlan is altogether wrong in saying that the Court would not have to come to a different conclusion, as to the application of Section 2, if the Baltimore & Ohio had hired a switch line to deliver the traffic to the industry, instead of a drayman.

The employment of a switch line would have been a prolongation of the *railroad* service.

It would have extended the rail line beyond the depot of the Baltimore & Ohio at Pittsburgh, and the additional distance involved would have made the haul from Cincinnati to the industry on the switch line at Pittsburgh a greater and a longer haul, and kept the haul from being "the same distance," which is an absolute prerequisite to the application of Section 2.

So that in the suppositious case put by Commissioner Harlan, there is no doubt in the world but that the Court would have come to a different conclusion, be-

cause in that instance, the haul over the railroad from Cincinnati to the point of destination on the switch line at Pittsburgh would have been a haul between different points of departure and arrival from those presented to the Court in the *Wight Case*, and Section 2 would have had no application at all, for in order to have any application whatsoever, in the language of Lord Chancellor Halsbury in the *Denaby Main Colliery Case*, "the termini both of arrival and departure must be the same."

In fact, as we have pointed out in a prior section (Section III, p. 27) of this argument, this was the very situation with respect to the "Pan Handle" at Pittsburgh. The beer was hauled by the Pan Handle from Cincinnati and delivered to Bruening's warehouse on the switch track of the Pan Handle at Pittsburgh.

And there was never any question raised as to any violation of Section 2 by the Pan Handle, and there could not be, because the haul was not the same distance as its haul from Cincinnati to its depot in Pittsburgh, but it was for a different distance.

The haul was not between the same termini of arrival and departure, as its haul from Cincinnati to its depot at Pittsburgh; the haul was from the same point of departure to a different terminus of arrival.

So that Commissioner Harlan, in his concurring opinion is completely and grievously wrong, and this Court and any other Court would have been obliged to come to a different conclusion if the Baltimore & Ohio had continued the rail movement beyond its depot at Pittsburgh by the use of a switch track of its own or a switch track belonging to some other railroad.

This would have taken the whole case entirely out of Section 2.

At page 80 of the Transcript, Judge Woods says the Wight Case gives no support to the view of the majority of the Commission. He says, "I think it clear that this case has no such bearing."

He is right.

X.

"Same Line" Defined. Through Rates and Through Routes.

We have seen that in the *Wight Case*, 167 U. S., 512, and other cases, it is settled that before a case can come within Section 2 the haul must not only be for the same distance under the same circumstances of carriage, but also must be "over the same line."

We will now discuss this feature briefly.

When two or more railroads form a through route at a through rate a new and independent line is constituted which is not the same line as either of the roads which make up the new and independent line.

In the opinion of Mr. Justice Brewer, announcing the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *C. & N. W. R. R. vs. Osborne*, 52 F. R., 912, the following language appears:

> "Where two companies owning connecting lines of roads unite in a joint through tariff they form for the connected roads practically a new and independent line."

He further says:

> "A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportion over connecting roads."
>
> *C. & N. W. vs. Osborne*, 52 F. R., 912.

So under this class of cases the haul from Oxford, North Carolina, by the Southern and thence over the

Seaboard to the industry at Richmond is over a different line from that of either the Southern or the Seaboard and is not "over the same line" as is necessary to come within Section 2 of the Act.

At page 6 of the Transcript in Section 5 of the petition, it is set out that there are tariffs covering the haul over the Southern from Oxford to the interchange tracks of the Seaboard at Richmond and tariffs covering the charges from the interchange tracks to the industry on the Seaboard, and that said tariffs "set out the through rates and charges from origin to destination." (Trans., p. 6.)

There is no dispute about this at all.

It is an admitted fact.

As Commissioner Clark says in his powerful dissenting opinion (Trans., p. 60); the practice of absorbing switching charges "is and for many years has been practically universal, and is and has been provided for in the carriers' tariffs. The practice was general before the *Wight Case* was decided and has been equally general ever since that time, and it has not until now been suggested that it involved or constituted violation of Section 2 of the Act."

Trans., p. 60.

It could not possibly be a violation of Section 2 because the haul is not over the "same line" while these through tariffs are in force, for they create new and independent lines.

That the new line is a unit separate and distinct from the two or more lines forming it is familiar to the Commission and has frequently been recognized by the Commission.

For instance, the Commission has said:

"A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, as the route is a *new unit*—one line formed of two or more connecting lines—so its rate for every service is a unit, even though it be divided between several carriers arranging themselves into the through route. As was said by the Commission in Brady vs. P. R. Co., 2 I. C. C. Rep., 131; 2 Inters. Com. Rep., 78, 'through carriage implies *a through rate*.' This is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or, in the absence of a joint arrangement, be published in portions by the several carriers. The route being one, a charge for a service over it is a charge for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the arrangement for the service. The rate is either a joint through rate made by arrangement by the parties to the through rate, or it is a combination through rate consisting of 'the separately established rates, fares, and charges applied to the through transportation.' This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed."

Through Routes and Through Rates, 12 I. C. C., 166.

This Court is thoroughly familiar with new and independent lines formed by combination of "local" rates, use of "proportional" rates and the use of "joint through" rates.

All this is elaborately and completely discussed by the Court in the case of *Kansas City Southern R. R.*

Co. vs. Albers Commission Company, 223 U. S., 573.

In that case this Court cites a passage from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *C., B. & Q. Ry. Co. v. U. S.*, and adopts same *in toto* as a part of its opinion. The passage is as follows:

> "If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and, if no action to that end is taken, they in effect adhere to the rates established, published and filed by them as applying not only to local but to through traffic."
>
> 223, U. S., 573, 597, 598.

It will be noted that all throughout this passage a "through rate" is spoken of, whether the same be made up of combinations of locals, or combinations of locals plus joint through rates, or combinations of either

locals or joint through rate with "proportional rates."

In other words, the through rate is the aggregate charge which applies to the through traffic from point of origin to point of delivery at destination. It is a unit, however made up. (12 I. C. C., 166.)

It is idle, therefore, in the case at bar, for the majority of the Commission or the majority of the District Court to attempt to draw a distinction between the line-haul up to Richmond, and the switching charge to the point of delivery on any spur track in Richmond, and to sever the through rate at the interchange tracks.

The through rate, however made up, is a unit, and cannot be decapitated at the point of origin or cut off at the other end.

It is needless to pursue this feature of the case further.

It may be well, however, to refer to the fact that the Transportation Act of 1920 reproduces and re-enacts Section 6 of the Commerce Act, and also a clause of the Panama Canal Act, especially recognizing and referring to "proportional" rates to the ports, and confers upon the Interstate Commerce Commission power to establish "proportional" rates "by rail to and from the ports."

U. S. Statutes at Large, Volume 41, page 456.

In his dissenting opinion, Commissioner Clark, in the case at bar, alludes to this clause of the Panama Canal Act.

Commissioner Clark's dissenting opinion is so strong, so clear, and so practical, that we print it in full as an appendix to this argument and trust that it will be taken as a part of this argument.

Commissioner Hall and Commissioner Clements con-

curred with Commissioner Clark. This dissenting opinion will be found at pages 59-62, inclusive, of the Transcript.

There can be absolutely no doubt of the fact that in the case at bar, the tariffs from Oxford, N. C., and other points of origin, together with the switching tariffs of the carriers of Richmond, constitute through rates applicable on through traffic from points of origin to points of destination or arrival, to-wit: the several industries located on the switch tracks of the various roads at Richmond.

XI.

"Like and Contemporaneous Service" Defined By This Court.

In previous sections of this argument we have shown that the case at bar does not come within Section 2 of the Act because the hauls involved are not for the same distance, over the same line, under the same circumstances of carriage.

In this section of the argument we will discuss some of the cases in which this Court has defined the phrase "like and contemporaneous service" in Section 2 of the Act.

A leading case is that known at the *Party Rate Case*, reported in 145 U. S., 263.

In that case this Court held that it was not a "like service" in the sense of Section 2, for a round trip passenger to travel in the same car between two points with a single trip passenger. The Court says:

> "For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by Section 2 to make an unjust discrimination."
>
> *I. C. C. vs. B. & O. R. R.*, 145 U. S., 263.

In *U. P. R. R. vs. U. S.*, 117 U. S., 355, this Court passed upon the meaning of the words, "similar kind of service" contained in a Federal statute.

The Sixth Section of the Act of Congress, passed

July 1, 1862, relative to the Union Pacific Railroad Company, provides that the Government shall at all times have the preference in the use of the railroad—"at fair and reasonable rates of compensation not to exceed the amount paid by private parties for the same kind of service."

(See 104 U. S., 663, *U. P. R. R. vs. U. S.*)

In a case between the same parties, reported in 117 U. S., 355, it appears that the company's uniform rate for the transportation of local passengers between Council Bluffs and Ogden, when passengers purchased tickets at either of those places, was $78.50 each; but by contracts with connecting railroad companies who sold through tickets at reduced rates from New York, San Francisco and other places over their own and the Union Pacific Railroad, the latter company received, as its proportion of the through ticket, only $54.00 for each through passenger carried between Council Bluffs and Ogden.

The Court said:

> "The contention on the part of the United States is that local passengers carried on its account, between Council Bluffs and Ogden, shall be carried at the same rates as are charged for through passengers passing between those points, as part of a journey over the whole line, although a difference is made in respect to all other persons. But the Court of Claims has found as a fact that the amount found by it is based upon rates between those points which are fair and reasonable, and not in excess of those charged to private persons for the same service. We cannot review this finding of fact, and no question of law arises upon it, unless it be one whether the service rendered in trans-

porting a local passenger between the two points is in law identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line. This we cannot affirm."

Union Pac. Co. v. U. S., 117 U. S., 355, 363.

In commenting on the last above cited case, the Supreme Court of the United States in *T. & P. Ry. vs. I. C. C.*, 162 U. S., 197, 231, said:

"In the case of *Union P. R. R. Co. vs. United States*, 117 U. S., 355, it was, in effect, held that the services rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails."

162 U. S., 197, 231.

It does not appear in the record, but it is doubtless a fact that the local passengers were carried by the Union Pacific Railroad in the same trains and in the same class of cars as through passengers; or in other words, that the physical service rendered by the company was precisely the same. At any rate, the *cost, risk*, etc., were the same in the case of the through passenger as in the case of the local passenger.

Nevertheless, the Supreme Court construed the words of the statute "for the same kind of service" so as not to cover the case, and held that the service was not the "same kind" but different.

In speaking of the case in 117 U. S., Judge Jackson, in his opinion on circuit in the celebrated "*Party Rate Case*" uses the following language:

> "A passenger on a through ticket from New York to Cincinnati travels at a lower rate per mile between Pittsburgh and Cincinnati than is charged the passenger traveling only between said places. The two may travel on the same train and in the same car, but the difference in the rates each is paying over the same distance is not unjust discrimination or undue preference, because the service is not identical. *Railway Co. vs. U. S.*, 117 U. S., 355-363."
>
> *I. C. C. vs. B. & O. R. R.*, 43 F. R., 37, 50.

In summing up the *Party Rate Case*, Judge Jackson, speaking of the single passenger and the party rate passengers, said:

> "* * * It cannot be properly said that the traffic is of like kind, and that the service is *identical*, or 'under substantially the same circumstances and conditions'."
>
> *I. C. C. vs. B. & O. R. R.*, 43 F. R., 37, 54.

In the *Import Rate Case*, the Supreme Court of the United States held that transportation of traffic from New Orleans to San Francisco, although in the same cars, was not "like service" with the transportation of traffic originating at Liverpool, passing through New Orleans and going on to San Francisco in the same cars as traffic originating at New Orleans. (See 162 U. S., 197.)

In the case of *United States vs. C. & N. W. Ry.*, 127 F. R., 785, the United States Circuit Court of Appeals for the Seventh Circuit, in an elaborate opinion, held that the transportation of theatrical people in parties of ten at a reduced rate, was not "like service" with the transportation of parties of troops composed of ten.

"It is not a like service, nor under substantially similar circumstances and conditions."
127 F. R., 790.

In the case of *Bitterman vs. L. & N. R. R. Co.*, 207 U. S., 205, this Court held that it would be a violation of the restrictions of the Act concerning equality of rates, if a railroad company failed to confine the use of reduced rate excursion tickets to parties who paid for them.

This case arose out of the situation in New Orleans in regard to tickets sold at one cent per mile to persons attending the Mardi Gras festival at that point.

The Louisville & Nashville Railroad filed a bill for injunction against certain ticket scalpers.

The Supreme Court of the United States not only declined to hold that round trip tickets sold at reduced rates to certain parties constituted unjust discrimination against those who paid for the local ticket at the higher rate, but even went so far as to actually decide that it would be a violation of the Interstate Commerce Act in regard to equality of rates if round trip, non-transferable, reduced rate tickets were not confined to the "class" of people who actually purchased them.

This decision throws a very strong light on what is like service and what is unjust discrimination.

XII.

Section 1 and Section 3 Not Involved in This Case.

We have endeavored to confine ourselves in this argument to the single question involved; that is to say, the naked question of law as to the correct construction and application of Section 2 of the Commerce Act.

It may be well, however, before closing this argument, to mention and to show that no other question is involved in this case.

That Section 1 is not involved appears from what the Commission says in its first opinion. At page 36 of the Transcript, we find the Commission saying:

> "No point is made, nor do we think one could be, that the switching line is not entitled to the compensation it receives, or that the charge for this service, considered independently, is unreasonable. Neither is it shown that the line-haul rate to Richmond is unreasonable, and upon this record we are unable to find that its combination with the switching charge constitutes an unreasonable rate."
>
> Trans., 36.

In its second opinion, this must have been and was, adhered to; because nothing is said on the subject, and no question is made by anybody in the whole record as to the reasonableness of the charges in and of themselves. In other words, Section 1 is not involved in this case.

Section 3. It is clear and admitted that Section 3 is not involved in this case. At page 46 of the Transcript, the Commission says:

"We do not consider that this practice is in violation of Section 3.

"Under that section it is now well established that actual competition justifies a difference in rates. Industry C's unfavorable location on the rails of a carrier which does not reach the common point is a factor which prevents the Seaboard's refusal to absorb the switching charges on its traffic from amounting to undue prejudice within Section 3. Further, it is not within the power of the Seaboard to equalize Industry C's unfavorable industrial location. If, in the event of an order requiring that the undue prejudice be removed, it choose to comply by refusing to absorb any switching charges whatsoever, Industry B, being on the rails of a carrier which reaches Oxford, would still retain its commercial advantage. We have expressly said that there can be no undue prejudice within Section 3 unless it is within the power of the carrier with the discrimination to do away with it by its own act.

"*Ashland Fire Brick Company v. So. Ry. Co.*, 22 I. C. C., 115.

"At page 120 the Commission said: 'The test of discrimination is the ability of one of the carriers participating in the two through routes from its two points of origin to the same point of destination to put an end to the discrimination by its own act'."

Trans., 46, 47.

This is precisely what this Court held in *I. C. C. vs. E. T. V. & G. R. R.*, 181 U. S., 1.

There was a question originally, in the case, with respect to alleged discrimination as between Norfolk and Richmond. This feature is no longer in the case.

(Trans., 40 to 45, inclusive.)

The point, Norlina, N. C., mentioned on the Commission's diagram at page 46 of the Transcript, is also out of the case. This point was mentioned by the Commission on said diagram as representative of local points; that is, points located strictly on one line and not reached by any other line of railroad.

At page 49 of the Transcript, the Commission says:

> "The carriers' refusal to absorb switching charges on traffic to and from strictly local points is justifiable. In such instances the transportation service is substantially dissimilar, for the movement is either over a different line or, if over the same line, for a substantially different haul."

So that everything is out of the case, except the naked question of law as to the correct construction of Section 2 of the Commerce Act.

XIII.

Order Too Indefinite.

The bill alleges, amongst certain other things, that the order is so indefinite and uncertain that it cannot be complied with.

It should be restrained and enjoined for this reason.

Respectfully submitted,

CLAUDIAN B. NORTHROP,
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Attorneys for Appellants.

Washington, D. C., September 13, 1920.

APPENDIX.

Dissenting opinion of Commissioner Clark in Richmond Chamber of Commerce v. Seaboard Air Line Railway, et al., 44 I. C. C. 455, 477-480; Trans., pp. 59-62.

CLARK, *Commissioner,* dissenting:

I agree to the views of the majority with regard to the situation at Norfolk. I can not agree to their conclusions as to the situation at Richmond. I am especially at variance with the majority views as to the interpretation and application of section 2 of the act. This section in its terms is free from ambiguity. It refers to and prohibits only one thing, to wit, charging "any person or persons a greater or less compensation for any service rendered * * * in the transportation of * * * property subject to the provisions of the act" than is charged "any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

In the illustration given in the majority report a person shipping from Oxford via the Southern Railway to point B in Richmond pays exactly the same charge that another person shipping via the same line from Oxford to point A in Richmond pays. The service to point B is all performed by the Southern, and it

retains all the earnings. In making delivery at point A, however, it must employ as its agent the Seaboard Air Line, and it pays the Seaboard Air Line's switching charge for that delivery; but the two shippers have paid exactly the same amounts.

I do not think that the holdings of the Supreme Court of the United States in *Wight* v. *United States,* 167 U. S., 512, which, by the way, was a criminal prosecution for actual rebating, have any application here, and I think that this view is amply supported by what the same court said in *I. C. C.* v. *Alabama Midland Ry. Co.,* 168 U. S., 144, decided not long after the *Wight Case* was decided. In the *Alabama Midland Case* the court took pains to avoid misinterpretation of what it had said in the *Wight Case* by saying:

> As we have shown in the recent case of *Wight* v. *United States,* 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.
>
> This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which

cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

While condemning all discriminations that are unjust and all preferences and prejudices that are undue, the manifest purpose of the Congress in this legislation was to promote and encourage free, fair, and open competition between carriers. The Commission is authorized to prescribe only the reasonable maximum charge which the carrier may assess. The carrier may charge less than that reasonable maximum if it chooses to do so. This Commission has frequently said that in meeting competition a carrier may, by its election, do many things which it could not be required against its will to do. For many years it has been a general custom for carriers by railroad to secure the road haul

on traffic which could be hauled by another carrier through payment or absorption of the switching charges necessary to be paid in order to have the traffic switched for it by another carrier at point of origin or of destination. There has been no secret about this practice; it is and for many years has been practically universal, and is and has been provided for in the carriers' tariffs. The practice was general before the *Wight Case* was decided and has been equally general ever since that time, and it has not until now been suggested that it involved or constituted violation of section 2 of the act.

In *T. & P. Ry.* v. *I. C. C.*, 162 U. S., 197, 219, the Supreme Court of the United States said:

> Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

This expression was quoted with approval by the same court in *S. P. Co.* v. *I. C. C.*, 200 U. S., 536, 552.

In *Transit Case*, 24 I. C. C., 340, 350, this Commission said:

> The act is an aid, not a hindrance, to commerce, and must be given such reasonable construction as makes to that end.

The interpretation of section 2 by the majority in the instant case will, in actual practice and in a practical way, be nothing less than revolutionary.

Of course, the purposes, principles, and substantive provisions of the act must be preserved, guarded, and observed. At the same time the fact should be recognized that we are dealing with a very practical question which involves the operation and efficiency of an industry stupendous in magnitude and vital to the welfare and the life of commerce and industry in our na tion. If A ships from Oxford via the Southern Railway to point B in Richmond and B ships from Oxford via the Seaboard Air Line to point B in Richmond and under public tariffs they pay exactly the same sums for the services rendered, there is open and fair competition between the Southern and the Seaboard Air Line for the competitive traffic. It is of no public concern that one of these carriers employs the other to perform for it a part of the services. The principle is the same as that which underlies a joint through rate. The only difference is in the manner of publishing the rate.

It seems not inappropriate to note where the decision of the majority logically, aye, inevitably leads. If it is a violation of section 2 for the Southern Railway to charge a shipper the same sum for transporting each of two cars from Oxford, one delivered at point A and one at point B in Richmond, and to pay the Seaboard Air Line for switching the car to point A, thus retaining somewhat less net earnings on the car deliv-

ered at A than on the car delivered at B, it follows that it is also a violation of section 2 for a carrier to accept for an identical service on its own line different compensation in the form of local rates and divisions of joint rates on traffic of the same character coming from different points of origin or destined to different points. Every carrier of importance has its local rates applicable between the termini of its own line. It joins with other carriers in joint through rates from and to points beyond its own line, of which it receives agreed upon divisions which are generally less than its local rates and which vary according to points of origin and destination, although it hauls these different shipments of the same commodity between the same points on its own line and in the same train. If this is a violation of section 2, then all joint rates are unlawful, unless they are made by combining the full local rates of the carriers participating therein.

It must also follow that proportional rates less than local rates for the same haul on a given carrier's line are in violation of section 2, and yet in the recently enacted Panama Canal act the Congress specifically authorized the Commission to prescribe proportional rates, and defined proportional rates as "those which differ from the corresponding local rates."

It is well established that whenever it is possible to do so a legislative act should be construed in such way as to give effect to all of its provisions. Section 4 of the act prohibits charging a greater compensation for a shorter than for a longer distance over the same line or route in the same direction where the shorter haul is included within the longer, except when and to the extent that the Commission, after investigation, permits the charging of less for the longer than for the

shorter distance. If the fact that in the instant case the carrier retains less revenue on one shipment than it does on another constitutes violation of section 2, the application of that principle to instances in which a carrier performs the same service on two shipments, as to one of which it earns or retains lower revenue than on the other, would invalidate relief granted by the Commission under section 4 and nullify the manifest intent of that section, in which the Commission is specifically authorized to grant relief.

I am authorized to say that COMMISSIONER CLEMENTS concurs in these views.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

SEABOARD AIR LINE RAILWAY COMPANY, Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railroad Company, appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and the Richmond Chamber of Commerce, appellees.

No. 27.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

The appellants, together with the Chesapeake & Ohio Railway Co. and the Richmond, Fredericksburg and Potomac Railroad Co., have a defined switching district at Richmond, Va., and each company publishes switching rates to be applied in switching cars to and from rail connections and industries located upon their respective lines within the district. Each carrier receives and delivers at Richmond all carload

freight, transported upon its own line, to any industry located upon its line for the Richmond rate, no switching charge being made therefor. Where carload traffic is shipped from or to an industry "off line" within the switching district the cars are transferred by the line carrier, for delivery, to the carrier upon whose line the industry is located. In off-line deliveries appellants absorb the switching charges of the carrier making the deliveries to the consignees, when the switching carrier is in competition with appellants for the traffic at a common point of origin or destination, but refuse to absorb such switching charges for like traffic, between Richmond and the same points, where there is no competition for the traffic with the switching carrier. Like absorptions of switching charges are made in cases of receipts of traffic from such industries and upon the same condition.

The Commission found that:

> It is a general rule among the carriers serving Richmond that switching charges will only be absorbed when compelled by competition.
> * * *
> The Coast Line, the Seaboard, and the Southern treat as competitive only that traffic for which the switching line is in competition with the line-haul carrier. In other words, the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac absorb switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reaches the common

> point with its own rails, while the southern carriers will absorb the switching charges only on traffic to and from a community which the switching line actually reaches. (Commission's Rep., Rec., pp. 45, 46.)[1]

The contention of the appellants before the Commission is stated in the report of the Commission (Rec., p. 46) as follows:

> The location of an industry upon the rails of the carrier reaching the common point constitutes a substantially dissimilar circumstance within section 3; and that section 2 is inapplicable, since the service performed from the point of origin to an industry upon a competing line-haul carrier's rails is not "under substantially similar circumstances and conditions" to that performed in the transportation to an industry otherwise situated.

The Commission found, as a fact—

> that the practice of the southern lines of absorbing switching charges only when the switching line actually competes with the line-haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful. (Rec., p. 50.)

The Commission also found that if the switching charges in two cases were different in amount because of difference in the distances the cars were switched, the cases would not be similar; that is to say, as between two shippers if the published switch-

[1] All references to the record in this brief are to the printed record.

ing charge to one industry was $5 and to another $2, the absorption of the latter would not require the absorption of the full amount of the former.

An order was entered by the Commission on the 28th day of April, 1917, requiring the appellants—

> to cease and desist, on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in said supplemental report to be unjustly discriminatory and unlawful within section 2 of the act to regulate commerce. (Rec., p. 63.)

By two subsequent orders the effective date of the order was extended to January 1, 1918.

On November 6, 1917, the appellants filed a petition in the District Court of the United States for the Eastern District of Virginia stating their contention and praying for an interlocutory and final injunction restraining the enforcement, operation and execution of said order. (Rec., pp. 2 to 19, inclusive.)

The United States and the Interstate Commerce Commission on November 16 and 17, 1917, respectively filed motions to dismiss the petition, setting forth the grounds of their motions. (Rec., pp. 71, 72.) The Richmond Chamber of Commerce was allowed to intervene as a party defendant.

The cause was heard upon the petition and motions to dismiss on November 17, 1917, before Circuit

Judges Pritchard and Woods and District Judge Waddill, jr. On January 19, 1918, an order was entered sustaining the motions of the defendants and dismissing the petition. (Rec., p. 81.) The opinion of the court was rendered by Pritchard, circuit judge, on January 19, 1918 (Rec., pp. 74 to 78, inclusive) and a dissenting opinion was filed by Woods, circuit judge. (Rec., pp. 78 to 81, inclusive.)

The opinion of the district court concludes as follows:

> We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous"; also as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circumstances and conditions." (*Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197.) While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. (*I. C. C.* v. *Ill. Cent R. Co.*, 215 U. S. 452; *I. C. C.* v. *D. L. & W.*, 220 U. S. 235; *Pa. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *U. S.* v. *L. & N. R. Co.*, 235 U. S. 314.)
>
> The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law. Therefore, we are of opinion that the petitioners are not entitled to the relief for which they pray, and this being a case where only injunctive relief is sought the peti-

tion will be denied and the bill dismissed. (Rec., p. 78.)

Appellants appealed to this court and assigned as errors (1) that—

> In a case where the switching charges are absorbed the freight moves between a point outside of Virginia and an industry in Richmond, the through transportation between origin and destination being made up of the movement over the tracks of the carrier performing the line haul and the additional movement over the tracks at Richmond of the carrier, or carriers, performing the switching haul to or from the industry and the separately published tariffs of the line-haul and switching carrier, or carriers, taken together provide for, and govern, the through transportation and through charges from origin to destination. In a case where the switching charges are not absorbed the freight moves between the same point outside of Virginia as in the other case of the absorption, but a different industry in Richmond. The through movement from origin to destination in the latter case is over the tracks of the same petitioner as line-haul carrier, but of a different switching carrier, or carriers, at Richmond, and, in most instances, via a different point of connection and interchange in said city, and the separately published tariffs of the line-haul and switching carrier, or carriers, in such case, taken together, provide for and govern the through transportation and total charges from origin to destina-

tion. The through route and service, when the charges are absorbed, are not the same route and service as when the charges are not absorbed, nor are the same through rates provided by the tariffs. The transportation service is not "like" in both cases or over the same lines, or for the same distance, nor is it performed under substantially similar circumstances and conditions within the meaning of said section 2.

Assignments 2, 3, and 4 are general to the effect that the court erred in denying the prayer of the petition and sustaining the motions to dismiss.

The sole question involved is whether appellants, in order to get the business from another switching carrier on whose line, within the switching district at Richmond, the consignor's or consignee's industry is located, may absorb the charge for the receipt or delivery of shipments within the switching district, and refuse to absorb like charges for like switching services within the district for shipments transported over their lines "under substantially similar circumstances and conditions" where there is no competition with the switching carrier for the traffic and because of the absence of such competition the shipments can be secured without absorbing the switching charge. In other words, may the admitted discrimination between shippers to and from Richmond, which the Commission has found to be unjust, be justified by showing competition between some of the carriers involved?

The argument of this case in this court was passed during Federal control of the railroads, during which time they were operated with other roads as a unit. The roads having been returned to the private owners, the question involved is now a vital issue.

ARGUMENT.

I.

The switching of cars performed by and for the line carrier in the receipt and delivery of freight is service essential to, and embraced within, the undertaking to transport the property.

A common carrier undertakes in every transportation service to perform three acts: (1) To receive the traffic offered under established rates; (2) to move the traffic over its line from the city of origin to the city of destination; and (3) to deliver the traffic to the consignee. These three acts constitute one transaction of transportation; "the line-haul rate embraces a receiving and delivering service." (*Los Angeles Switching case*, 234 U. S. 294, 310.) The switching of empty cars for the purpose of being loaded with goods intended for interstate commerce and the switching and placing of a loaded car "on some terminal or industrial track for delivery" constitute a part of the interstate movement. (*Illinois Central Railroad* v. *Louisiana Railroad Comm.*, 236 U. S. 157.)

The mode of receipt and delivery of less-than-car-load traffic differs carrier's services in receiv-

ing and delivering carload traffic. This is necessarily so because less-than-carload traffic is loaded from the depot into the car and unloaded from the car into the depot by the carrier. In some cases the carrier furnishes a trap-car service for the collection and delivery of less-than-carload traffic. On the other hand, generally speaking, carload traffic, excepting live stock, is loaded by the shipper and unloaded by the consignee. This necessitates the placing of the empty car at a point where it can be loaded by the shipper and the loaded car at a point where it can be unloaded by the consignee. This service is performed by carriers in various ways according to the custom, rules, and regulations of the place at which the traffic is received or delivered. Ordinarily the empty car is placed either upon a team track or a siding, or "spotted" at the door of a warehouse or elevator upon a sidetrack for loading; and when loaded the carrier takes the car from the loading point to its yard, where trains are made up and the car is finally placed in a train *for* transporting. Upon arrival at the city of destination the train goes to what is known as the "break-up yards" of the carrier, where the cars are uncoupled and each car is moved by the carrier to a team track or spotted at a warehouse or elevator, or is shunted upon a private siding. (Hutchinson on Carriers, third edition, sec. 711.) These three performances are different in kind, but under the American system are all covered, unless otherwise specified in the tariffs, by the line-haul rate. Under the English system a different

practice prevails, where a strict account is kept of terminal services and different charges for different kinds of services are applied.

The act to regulate commerce uses the word "transportation" in many parts of the act, and, to make its provisions apply to all kinds of services involved in the carrier's undertaking, section 1 defines the word "transportation" to include not only the transporting of property from city to city, but also "all services in connection with the receipt, delivery," etc., of the traffic. The transportation of the traffic from city to city is "the line haul"; the services performed by the carrier in connection with the receipt and delivery of carload traffic is known and designated as "switching" or "terminal service." At each large terminal there are designated "switching limits" or districts within which the switching service in connection with the receipt and delivery of carload traffic is performed. These switching limits in a large city are defined and include all lines of railroad serving the city. The roads have connections with each other for the convenience of the public giving shippers access to and from each road within the switching limits. The switching service in connection with the receipt and delivery of particular carload freight may be performed in part by a carrier other than the line-haul carrier. That is to say, if a shipment is to be made by an industry located within the switching district upon the line of carrier A, to a place in another State upon the line of carrier B, carrier A

moves the car to a connection with carrier B's line, where carrier B takes it and moves it to its make-up yards to be later coupled into a train going to the point of destination. The whole service by both carriers from the industry to the make-up yards of carrier B is a receiving service, a car movement, and in no sense is it a line-haul service, which is a train movement. Where two carriers participate in such a switching service carrier A acts as the agent of carrier B in the receipt of the traffic. Precisely the same kind of movements occur in delivering a car to a consignee off the line of the transporting carrier. The petition of the appellants clearly states the facts upon this point and says:

> The aforesaid service of transportation of an inbound or outbound loaded car between the industry and the tracks of the line-haul carrier is commonly known and is referred to hereinafter as a "switching service." The carrier performing the switching service is known and is referred to hereinafter as the "switching carrier" as distinguished from the line-haul carrier, *and the switching carrier in all such cases is said to switch for the line-haul carrier.* [Italics ours.] (Rec., pp. 3, 4, 5.)

If the line-haul carrier has no direct rail connection with the carrier on whose line the industry is located, then the receipt or delivery is made, the petition states, "*through the agency* of an intermediate company." (Rec., p. 3.)

The switching carriers are in no sense performing a separate line service; it is simply a car movement in receiving or delivering *a car* from or to the industry; the switching carriers are the agents acting for the line carrier in making *its receipt or delivery* of freight which it has transported or is to transport between cities or towns in train movement. The whole performance, the receipt of the car, the line haul, and the delivery to the consignee, is a fulfillment of a single undertaking by the line carrier.

> The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. (*Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 135; *North Penna. R. Co.* v. *Commercial Bank*, 123 U. S. 727, 734; *Inter. Com. Comm.* v. *Chicago, etc., R. Co.*, 186 U. S. 320.)

All such switching to and from industries on its own tracks or sidings within the switching limits at Richmond are made by the line carrier as a delivery or receiving service "without any added charge over and above the charges accruing under the said line-haul rate." (Petition, Rec., p. 7.)

Without discussing the right of the line-haul carrier to charge the shipper for such receipt and delivery terminal services, on-line and off-line, that issue not being in this case, it is clear that under the custom prevailing for many years in Richmond as alleged in the petition (Rec., pp. 6, 7), the appellants

and other carriers have recognized the right of shippers and consignees to designate an industry on any line within the switching limits at Richmond from which they will receive and to which they will deliver traffic in connection with line transportation. These receipts and deliveries, whether made from industries upon the line-carrier's railroad or upon the railroad of another carrier, constitute the receipt and delivery of carload traffic within the switching limits. To make such receipts and deliveries is the duty and undertaking of every line carrier. "Delivery in a proper manner may doubtless be provided for by contract, *but in the absence of any specific provision upon the subject it is determined very largely by custom.*" (Elliott on Railroads, second edition, vol. 4, secs. 1521, 1522, and cases cited.)

TERMINAL CHARGES.

Under the interstate commerce act it is conceded that carriers have the right to make reasonable charges for terminal services, *provided* no unjust discrimination is made *between shippers* of like traffic. In the Los Angeles case this court said (p. 310):

> The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.
>
> Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or sidetracks could not, in any circumstances, be regarded as a

> distinct service for which separate compensasation might be demanded. * * *
>
> On the other hand, it can not be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute.

But the right of the appellants to charge shippers for receipts and deliveries from and to industries "off line" was not questioned in this case, nor was the reasonableness of such charges under consideration. The sole question was and is, May the appellants absorb the off-line switching charges for one shipper and refuse to absorb them for another shipper of like traffic over their own lines to and from Richmond?

The point we desire to impress under this heading is that it is a part of the line carrier's undertaking to receive carload traffic which it offers to transport at the point of loading and to deliver the traffic, after it has been transported, to the consignee. And if by a general custom, which is admitted to exist at Richmond, the carriers have established switching limits within which carload shipments are to be received from and delivered to industries within such limits, upon whatever road they may be located, by or for the line carrier, the duty rests upon

the line carrier to receive and deliver every carload shipment according "to the necessities of the respective localities in which it is received and delivered," and that the whole performance is a unitary act of transportation. If the charges made by other switching carriers "for the line-haul carrier" are absorbed for one shipper, they must be absorbed for every contemporaneous shipper of like traffic transported on their respective lines between Richmond and interstate points "under substantially similar circumstances and conditions."

II.

Interpretation of Section 2 by this Court.

Section 2 of the interstate commerce act, as it existed at the time of the hearing of this case before the Commission, reads as follows:

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property * * * subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation * * * of a like kind of traffic * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which

is hereby prohibited and declared to be unlawful.

1. PARTY RATE CASE.—In *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.* (145 U. S. 263, 281) this court held that there was a substantial difference in the carriage of ten or more persons on a party-rate ticket and where only one person was transported on a single ticket, and therefore the selling of party-rate tickets at a less rate than the single fare did not create an unjust discrimination against the person paying an individual fare. The court said (p. 284):

> In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from 1 person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of 1, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.
>
> * * * * *
>
> It is possible to conceive that party-rate tickets may, by a reduction of the number for

> whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

This case had reference to passenger traffic. It may be stated that the same general doctrine has been recognized and applied in the transportation of property in carloads as distinguished from less-than-ca.. ad traffic. The former is different from the latter in the loading and unloading, and in receiving revenue from a full-loaded car instead of a partly loaded car. These are considerations which may be truly said to affect the carriage.

2. IMPORT RATE CASE.—In *Texas & Pacific Railway* v. *Interstate Commerce Commission* (162 U. S. 197) this court found that the section was based on section 90 known as the "equality clause" of the English act of 1845, and held that the traffic was not the same or "like" and was not transported under the same circumstances and conditions where it came to a port as foreign freight by water, as freight originating at the port, and that this affected the matter of carriage. The court said (p. 218):

> As we have already said, it could not be supposed that Congress in regulating commerce would intend to forbid or destroy an existing branch of commerce of value to the common carriers *and to the consumers within the United States.*

* * * * *

> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges ought to be considered in forming a judgment whether such differences were or were not "unjust."

This does not mean that a carrier's interest in *getting traffic through competition* will justify a difference in the treatment of shippers. This would be giving paramount consideration to the interest of the carrier. The public interest is paramount and gave rise to the law in the second section of the interstate commerce act. In the question then before the court, the transportation of foreign shipments and the increase of foreign trade, the public had a direct interest as well as the carrier, and this fact might be considered in determining whether the discrimination was unjust within the meaning of section 2.

3. In *Wight* v. *United States* (167 U. S. 512) the section was construed by this court as follows:

> The wrong prohibited by the section is a discrimination between shippers. It was designed *to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.* Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another.

The controversy in that case arose by the Baltimore & Ohio allowing a shipper 3½ cents for performing the delivery service for the carrier. The reason assigned was that the Baltimore & Ohio could not secure the business without making the allowance, thereby putting itself on an equal footing with its competitor. Upon this question the court said:

> Whatever the Baltimore & Ohio Co. might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong

> prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.
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> * * * * *
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> It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

The ruling in the Wight case may be summarized as follows: (1) Under section 2 only *matters of carriage* can be considered in determining what is like traffic under substantially similar circumstances and conditions, and that *competition can not be considered* in determining whether an allowance for special service may be made to one shipper and not made to another; and (2) that an allowance for cartage, which is a part of the delivery service of the carrier, can not be made to one shipper and refused to another where the traffic is like and contemporaneous and moved under substantially similar circumstances and conditions by the line-haul carrier. That this was a proceeding on an indictment called for no different rule of construction. The section is "to be construed sensibly, and with a view to the object aimed at by the legislature." (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17.)

4. INTERPRETATION OF THE PHRASE "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS."—In *Interstate Commerce Commission* v. *Alabama Midland Railway Co.* (168 U. S. 144, 166, 167) the court was considering the phrase "substantially similar circumstances and conditions" as then found in section 4 of the act. It was not claimed that the case came within the provisions of section 2, but the court discussed the meaning of the same language used in section 2. Referring to the Wight case, the court said:

> The purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, *refers to the matter of carriage and does not include competition between rival routes.*

And then proceeded to show that the difference in the purposes of sections 2 and 4 was controlling in applying the phrase. Section 4 having for its purpose the prevention of a different evil—the "long and short haul" provision—competition might be considered in section 4 cases, whereas it could not be considered in a case falling under the provisions of section 2.

5. THE FORWARDING CASE.—In *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.* (220 U. S. 235, 252, 253) the railroad contended that forwarding agents collecting less-than-carload lots to which the less-than-carload rates applied, putting them into carloads and shipping at carload rates deprived the carriers of a large amount of revenue to which they were justly entitled; that is to say, had the shipments been made by the owners of the freight the less-than-carload rates, which were higher, would have applied; therefore, *to protect their revenues*, the carriers discriminated between forwarding agents and "owners" of freight contemporaneously shipped under substantially similar circumstances and conditions. The court referred again to the fact that section 2 was taken from section 90 of the English railroad consolidation act of 1845, known as the "equality clause," then summarized the decisions of the English courts at the time of the passage of the interstate commerce act, and said:

> That clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. * * * And it may not be doubted that the settled meaning which was affixed to the English equality clause at

> the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us. (Citing the Wight and Alabama Midland cases.)

Referring to the argument of the carriers that this practice might result in a withdrawal of the carload rates, so beneficial to the public, to protect the revenues of the company, the court said:

> In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates it has the right to discriminate as to those who shall be entitled to avail of them.

Here, again, this court met the argument of "necessity" and ruled that the necessity of a carrier, to get business by competition, was not to be considered in construing and applying the prohibition of section 2; that, as stated in the former cases, the *controlling matters for consideration were those affecting carriage and not competition.* If the carriage or transportation was substantially different, section 2 would not apply; but if the service performed by the carrier for one shipper was substantially like, contemporaneous, and under the same circumstances and conditions, the carrier could make no discrimination,

which the Commission found to be unjust, either by rebates, additional services, or other devices.

6. FORWARDING CASE.—In *Lehigh Valley Railroad Co.* v. *United States* (243 U. S. 444, 445, 446) an allowance was made to Sheldon & Co., forwarding agents for importers, for a "varying percentage upon the published rates and also a salary of $5,000 a year." In this case the forwarder was given a special consideration to induce shipments over the rail carrier's line. The court held that it came within the Forwarding case and "however honest and however justifiable on commercial principles, [it] would be contrary to the act to regulate commerce as it now stands." Referring to section 2 and the Wight case, the court then said:

> Of course it does not matter whether the allowance takes the form of *a deduction* or a cross payment. Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.
>
> * * * * *
>
> The services rendered by George W. Sheldon & Co., although in a practical sense "connected with such transportation," *were not connected with it as a necessary part of the carriage*—were not "transportation service," * * * [Italics ours.]

This case holds that any consideration paid to or received by a shipper which induces shipment, but which does not affect carriage or the transportation, is, if it creates a discrimination which the Commis-

sion finds to be unjust, within the provisions of section 2.

7. THE CASE AT BAR.—After these clear expositions of the law in the cases cited, we need state only two illustrations of the clear working of the practice condemned in the present case, bearing in mind that a transportation service by a single line carrier embraces the receipt of the car and the delivery of it to the consignee within the switching district at Richmond.

(1) Two shippers at the same point in the State of Georgia respectively ship, by the Southern Railroad, a car of potatoes to Richmond to be delivered to different consignees within the switching district. The carrier accepts the cars and transports them to Richmond in the same train; from its break-up yards it delivers the car belonging to A to the consignee upon another line within the switching district and pays the other switching carrier a charge of $3, the published rate, for making a part of that delivery for the Southern Railroad; it absorbs this switching charge *because the switching railroad is in competition with the Southern* at the point of origin. In precisely the same manner it transports and delivers the carload shipped by B to the consignee within the switching district, paying a switching charge of $3 to the switching carrier, but refuses to absorb the $3 for B *on the ground that there was no competition compelling it.* Can it be said that these two contemporaneous shippers from the same point over the Southern Railroad to Richmond have been

treated alike? The goods conveyed were a carload of potatoes in both cases; they moved over the same line to Richmond and they were delivered by the line carrier to the respective consignees under the same rules regulating line-carrier deliveries to consignees within the switching district at Richmond, and yet B is compelled to pay for that single service $3 more than A, and the only excuse made for this discrimination is that *competition at the point of origin* with the switching carrier compelled the absorption of the switching charge *in order to get the business.* Precisely the practice and argument that was made in the Wight case. As there was no *competition* with the switching carrier as to B's carload, they took from B all they could get under a different and nondiscriminatory rule which the carriers might properly have adopted, charging the switching charge to every shipper calling for offline deliveries. But to make the charge to B and absorb it for A is a clear violation of section 2. Such a discrimination, illustrated above, may occur in respect of traffic originating at any point on the lines of the appellants where competitive conditions with switching carriers at Richmond exist.

(2) Take another illustration. Two factories producing precisely the same product are located within the switching district at Richmond but upon different rail lines. They are competing for business throughout the territory served by the appellants. They both load and ship at the same time in car lots their

fabrications or products, which are precisely alike, to the same point on the Southern Railroad. When A comes to pay his freight bill he is charged the Richmond rate to the point of destination plus $3 for switching in the receipt of the traffic by the Southern. The same switching for receipt of the traffic is done for B, but the $3 is absorbed by the Southern because of the competitive conditions above stated. Are these two industries treated alike by the Southern Railway? The shipments are the same, the movement is the same in both cases, but the charges by the Southern Railway are $3 different on a carload.

To state these cases makes it apparent that there are hundreds of cases falling within the operation of this practice which are clearly in violation of section 2. No wonder that the Chamber of Commerce of Richmond, looking after the commercial growth of the city, reaching out to all parts of the country for trade in its products, found that this practice of charging one industry for switching and at the same time absorbing the switching charge of another under precisely similar conditions worked a serious disadvantage to the industries and impeded the commercial growth of the city.

But it is said there was some difference in the distance of the switching movement. This is immaterial to the Southern for the switching charges were the same.

In *Interstate Commerce Commission* v. *Detroit, Grand Haven & Milwaukee Railway Co.* (167 U. S. 633, 644), where there was in fact a difference as to

distance between Ionia and Grand Rapids, the court said:

> There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities.

The rates being the same to both places, the question whether accessorial delivery service at Grand Rapids was an unjust discrimination against the shippers at Ionia, where no such service was rendered, was considered and the court suggested:

> It may be that it was open for the Commission to entertain a complaint of the Ionia merchants that such a course of conduct was in conflict with sections 2 and 3 of the act; but, as we have seen, such questions, if they really arose in the proceedings before the Commission and in the circuit court, have been withdrawn from our consideration in this appeal from the decree of the circuit court of appeals.

We cite this case only to show that a difference in the *actual distance* over which two cars are hauled, in a single line haul including receipt and delivery, is not material in determining a case arising under section 2, if the *rates are the same as to both* shipments. Distance is not controlling in rate making. (*L. & N. R. Co.* v. *United States*, 238 U. S. 1. So long as the switching charge covers a fixed distance within the switching limits it makes no difference whether the car of one shipper is hauled 100

feet and that of another 5 miles, the charge being the same for each switching service. In the Los Angeles case, speaking upon this subject of distance, the court said (p. 313):

> The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles; that is, it dealt with the situation upon an average basis making the same charge for all this switching in a given area which constituted its terminal district. It was the service within those switching limits that the Commission was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area and the average spur-track service, the Commission reached the conclusion set forth.

The only question in such cases is whether the charge is the same for the switching service in each case. The Commission's report stated (Rec., p. 50):

> We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails. The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the

> diagram: Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio.

It is also contended by appellants' counsel that this is a "through route" over different lines of railroad. A through route consists of two or more *line hauls*. The service of receiving, transferring, and delivering traffic over a through route, by switching services, is incidental and is embraced within the line-haul rate. Section 6 of the act providing for the filing of rates says:

> The schedules printed as aforesaid by any such common carrier shall plainly state the *places between which property and passengers will be carried,* * * * *and shall also state separately all terminal charges.* * * * [Italics ours.]

That is to say, the line-haul charges from place to place are to be stated and if there are any switching or terminal charges connected with the line-haul movement such terminal charges shall also be stated.

Section 6 also provides that schedules shall show the rates—

> for transportation between points on its own *route* and points on the *route* of any other carrier by railroad.

In other words, the joint or through rates cover two or more line hauls, not a line haul and terminal or switching service. The Commission, speaking upon this point, said:

> A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, as the route is a new unit—*one line formed of two or more connecting lines*—so its rate for every service is a unit, even though it be divided between the several carriers arranging themselves into the through route. (*Through Routes and Through Rates*, 12 I. C. C. 163, 166.) [Italics ours.]

In *St. Louis Southwestern Railway Co.* v. *United States* (245 U. S. 136, 139, N. 2) this court said:

> A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point *on the line of one carrier to destination on the line of another.* [Italics ours.]

The petition states the facts as follows:

> Petitioners aver that the transportation service from the point of origin to the industry at Richmond, as already set out, is not ended

> or concluded until the property transported is delivered at said industry. The line-haul movement of the originating carrier to its point of connection at Richmond with the delivering carrier upon whose tracks the industry is located is but a part of such through transportation. The haul by such connecting line *for delivery* to the industry is necessary to complete the through transportation.

A single-line haul with a delivery to the consignee does not constitute in any true sense a through route. It is a one-line haul and, as before stated, the receipt of the traffic from the shipper and its delivery to the consignee are embraced within the line-haul service and rate.

Counsel for appellants claim that the diagram used as an illustration is not a correct map of the situation. The answer is that it does not pretend to be a map, but is only given as an illustration of the working of the appellants' practice in absorbing switching charges for one and not absorbing them for another shipper. The exact location of the "break-up"and the "make-up" yards of the carriers is not a material factor. These yards can be placed wherever the carrier finds it convenient in making up and breaking up its trains. The important fact is that the trains are there made up, and broken up, *for the purpose* of making receipts and deliveries from and to every point within the Richmond switching district.

III.

Findings of fact by the Commission.

In the Import Rate case the court, referring to the questions involved in section 2, said (219):

> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts.

Prior to the passage of the Hepburn Act the court reviewed these questions of fact. Counsel for appellants have cited some of the older cases and seem to desire the court to exercise the same jurisdiction in this case. In *Procter & Gamble* v. *United States* (225 U. S. 282, 297, 298) this court said:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission for the purpose of enforcing

> or restraining their enforcement the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so.

In *United States* v. *Louisville & Nashville Railroad* (235 U. S. 314, 320) the court said:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

Referring to the findings of the Commission in the Los Angeles Switching case, the court said (p. 311): "Assuming that they were based upon evidence, they are not open to review." (Citing *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.*, 220 U. S. 235, 251; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547, 548; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 92; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 232 U. S. 199, 221.)

CONCLUSION.

The practice of the appellants under consideration by the Commission was undisputed and is clearly stated in the petition in this case. (Rec., pp. 8 and 9.) Appellants justify the discrimination as follows:

> The reason for the absorption and payment of switching charges by the line-haul carrier, as described and illustrated above, is that the switching carrier, upon whose tracks at Richmond the industry is located, is an active competitor with the line-haul carrier, upon whose tracks the industry is not located, for the line-haul transportation of the traffic to or from Richmond. (Rec., p. 9.)

And, as the line carrier delivers free to any industry upon its own terminal tracks, the petition avers that if the practice of absorbing the switching charges of a competing carrier upon whose tracks the industry is located were not absorbed "the result would be, * * * that the carrier upon whose tracks the industry is not located would obtain for its own route to or from Richmond no part of the transportation service." * * * (Rec., p. 9.)

With this admitted practice before it and the reasons assigned by the appellants for its adoption and enforcement, the Commission passed upon the following questions of fact: Are single line shipments for different shippers, over either appellant's line, to or from points on the line to or from Richmond, including a receipt or delivery within the switching limits at Richmond regardless of whose tracks the

industry is located upon, "like" and contemporaneous shipments "under substantially similar circumstances and conditions"? Upon this question the Commission found:

> It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.
>
> * * * * *
>
> We are of the opinion, therefore, and find, that the practice of the southern lines of absorbing switching charges only when the switching line actually competes with the line-haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful.

There is no claim made in the petition that the appellants did not have a full and fair hearing before the Commission, or that the Commission did not follow the procedure prescribed by the statute, or that the provisions of section 2, properly applied, deprive the appellants of any constitutional right, and no claim that there was no substantial evidence before the Commission to support the order, for the facts are admitted. We submit that under the de-

cisions of this court above cited the district court committed no error in holding that:

> While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive.

Therefore the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER, 1920.

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

SEABOARD AIR LINE RAILWAY CO., ET AL., Appellants,
v.
UNITED STATES OF AMERICA, ET AL.
No. 27.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The sole question is the power of the Interstate Commerce Commission to direct the rail carriers serving Richmond, Virginia, to cease and desist from the practice of discriminating in charges for switching car load traffic handled under circumstances and conditions within the switching limits which the Commission found to be similar.

Seaboard Air Line Railway Co., Southern Railway Co., and Atlantic Coast Line Railway Co. operate lines aggregating approximately 15,000 miles, substantially all of which are located south of the Ohio and Potomac Rivers and east of the Mississippi (Tr. 3). Within that territory are located the terminal cities of Richmond, Norfolk, Louisville, Cincinnati, Charleston, and Memphis. In each city there

has been established what is familiarly known as the "switching limits," i. e., the boundaries of the terminals on and over which carriers receive and deliver traffic from and to the main lines by switching.

With the exception of Richmond[1] in all of these several cities the carriers receive and deliver traffic through interchange switching on the line-haul rate, each main line paying to the switching line the latter's charge for the service and absorbing the same in the line-haul rate (Tr. 26, 30, 33).

That practice also prevailed at Richmond until November 6, 1909, when the carriers published and filed tariffs by which the three carriers named "ceased

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[1] Complaint before the Commission (Tr. 26):

"That said increased charges are unreasonable and unjust and subject the members of complainant's association, their traffic, and the city of Richmond to undue and unreasonable prejudice and disadvantage as compared with other competitive points, particularly Norfolk, Va., Louisville, Ky., Cincinnati, Ohio, St. Louis, Mo., Memphis, Tenn. * * *."

Report of the Commission (Tr. 30, 33):

"The resulting increased transportation charges are alleged to be unreasonable and to unduly discriminate between shippers in Richmond and against Richmond shippers as compared with shippers at Norfolk, Va.; Memphis, Tenn.; Louisville, Ky.; Cincinnati, Ohio; and St. Louis, Mo., where different practices are said to obtain. * * *

"A portion of the connecting-line switching on trap and station-order cars and all of connecting-line switching on carload shipments of coal and coke are absorbed despite the nonexistence of the competition now made a condition precedent to the absorption of other carload switching. On trap and station-order cars this absorption is voluntary; on coal and coke, according to defendants, it is made because the Chesapeake & Ohio delivers coal from its West Virginia mines anywhere in Richmond at the Richmond rate. But under its broad definition of competition the Chesapeake & Ohio also delivers anywhere in Richmond at the Richmond rate considerable other carload traffic, and we do not see why its practice should exert a controlling influence only as to coal and coke. It is true that the nature of these commodities renders this traffic largely competitive commercially, but we do not think this justifies the discrimination, nor is this phase of competition embraced in the principle here advanced. Absorption is made on intrastate shipments of fertilizer because the railroad commission

their indiscriminate absorption of connecting-line switching charges on carload traffic at Richmond, Va., and provided that thereafter such switching charges would be absorbed only when the carrier performing the transportation service was in competition for the traffic with the switching line" (Tr. 21, 30, 40, 42). Coal and coke have never been included in the non-absorption provisions (Tr. 31).

On January 6, 1912, Richmond Chamber of Commerce, "composed of manufacturers, merchants, and business men of the city of Richmond, Virginia, having as one of its objects the promotion of the welfare and business interests of the said city," whose several

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of Virginia has withheld its approval of the proposed nonabsorption of this traffic. Furthermore, at Norfolk, Va., switching charges on traffic from the Norfolk and Portsmouth Belt Line are absorbed, although the belt line can not in any way be a competitor for the line haul. It is urged that the belt line, owned jointly by the carriers serving Norfolk and Portsmouth, is in reality but an extension of the terminals of each road and that the switching charge paid the belt line by the line carriers is but their respective contributions to the maintenance of their joint property.

"At Charleston, S. C., almost the same condition obtains with respect to the Charleston Terminal Company. At Louisville, Ky., the general rule published in the tariff of the Southern Railway, is that connecting-line switching charges on carload traffic, trap and station-order cars, both competitive and noncompetitive, will be absorbed when the net revenue of the Southern is not less than $12 per car. This defendant explains that Louisville is practically in official classification territory, where the more liberal absorption rule prevails, and that its practice at Louisville is controlled by the practice of the carriers with whom it competes for Louisville traffic; that these lines do not take the same view of switching absorption as the Southern Railway: and that it can not be alone in the enforcement of the restricted theory if it is to obtain business. The carriers at Louisville apply the trunk-line rule, while the Southern lines at Richmond, after considerable controversy, have agreed upon a narrower view. At Memphis, Tenn., connecting line switching on trap and station-order cars to or from other than local stations on its Memphis division is absorbed by the Southern Railway, because, it alleges, the business district at Memphis has gradually moved from its terminals and it must make this sacrifice to place itself on a competitive basis with the other lines."

members "are engaged in manufacturing and in buying and selling various commodities and shipping the same between Richmond and various points in other States over the lines of defendants and their connections," filed a complaint alleging that the additional charges resulting from the nonabsorption of the switching charges caused "undue preference and advantage to certain other industries at Richmond, all of which is in violation of the act to regulate commerce," etc. (Tr. 21, 26).

After a hearing, the Commission filed a report (Tr. 29) and entered an order directing the carriers to cease and desist (Tr. 38). Subsequently, on application of both sides, an order was entered reopening the case (Tr. 39). Additional evidence was adduced. The only pretense of any defense or justification ever advanced by the carriers at either hearing for this unquestioned discrimination was that where two or more of the carriers served any point of origin or destination, however far distant from Richmond, at which they competed for the traffic, the circumstances and conditions were dissimilar from those in which one carrier alone served the point and there was no competition, in which latter case the additional charge for switching at Richmond was justified. The Commission said (Tr. 46): "The precise point is best illustrated by a practical example. The accompanying diagram shows the situation. Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is

a local point on the Seaboard. Assume that industries A, B, and C on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's switching charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

On April 28, 1917, the Commission filed its final report and order (Tr. 40, 63) directing the three carriers named (44 I. C. C., 455)—

> to cease and desist on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in said supplemental report to be unjustly discriminatory and unlawful within section 2 of the act to regulate commerce;

and—

> to establish, on or before August 1, 1917, * * * and thereafter to maintain and apply uniorm regulations and practices for the absorption of charges for the switching of inter-

state carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions.

On November 6, 1917, the petition was filed. On the present record the hearing on application for interlocutory injunction was had before Circuit Judges Pritchard and Woods and District Judge Waddill. On January 19, 1918, a full opinion was filed, Judges Pritchard and Waddill concurring (Tr. 74), Judge Woods dissenting. An order was entered denying the application for interlocutory injunction and directing that the petition be dismissed. (249 Fed. Rep. 368.)

Thus, with practically the entire commercial world, the entire immediate business interests of the city of Richmond, the practice of absorbing all switching charges on coal and coke, the order of the Commission, and the opinion and decree of the District Court all against them, the appellants, staggering under the weight of that load, now ask this court to substitute its judgment for that of the Commission and reverse the decree.

BRIEF AND ARGUMENT.

I.

THE FINDINGS OF THE COMMISSION ARE CONCLUSIVE THAT THE TRAFFIC ON WHICH THE SWITCHING CHARGES ARE ABSORBED OR NONABSORBED IS HANDLED IN THE RICHMOND SWITCHING DISTRICT UNDER SIMILAR CIRCUMSTANCES AND CONDITIONS.

Section 2 provides (24 Stat. 379):

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Texas & Pacific Ry. v. *I. C. C.* (162 U. S. 197, 233):

> The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: * * * in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the

localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.

The carriers contend that the discrimination in the nonabsorption of the switching charges is justified by competition.

But the carriers themselves are divided and inconsistent on just what the competition is which they claim; and if they are divided and inconsistent, and do not know what the competition is, their position is weak when they ask the court to work out a solution for them by which to overthrow the order.

The Commission found (Tr. 34, 35):

> If absorption practices are to be uniform, as defendants contend they should be, and if they are to be based upon a definite principle, there is no reason why that principle should not be uniformly applied. At Richmond a certain theory is employed because the southern lines have agreed to employ it; at other cities an entirely different theory exists, not because of any difference in the matter of carriage, but because such different theory best suits the carriers serving those points. In other words, the southern lines would apply the restricted theory wherever they can and would conform to a different practice at places whose policy they can not seriously influence. * * *
>
> If it be true that absorption must be governed entirely by competitive influences, it may well be argued that only that competition

which is compelling should be recognized. All of these defendants contend that absorption is compelled when there is competition with the switching lines, but the southern carriers insist that this is the only competition which is compelling. If the shipment originate at a point common to all of the southern lines, destined to an industry in Richmond on the tracks of the Chesapeake & Ohio, the traffic is certainly competitive to Richmond, but because the Chesapeake & Ohio is not a competitor the switching charge of that line is not absorbed. In other words, such traffic ceases to be competitive upon its arrival at Richmond.

The Commission further found (Tr. 45, 46):

It is a general rule among the carriers serving Richmond that switching charges will only be absorbed when compelled by competition. But the so-called trunk lines, as distinguished from the southern lines, give a different meaning to the term "competition." The Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac consider all traffic competitive "where two lines operate between different points regardless of the location of the industry;" that is to say, that traffic is competitive where a point is served by more than one line even though an industry at such point may be on the local terminals of but one of the carriers. The Coast Line, the Seaboard, and the Southern treat as competitive only that traffic for which the switching line is in competition with the line-haul carrier. In

> other words, the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac absorb switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reaches the common point with its own rails, while the southern carriers will absorb the switching charges only on traffic to and from a community which the switching line actually reaches.

Moreover, on a full record and with these divided and conflicting views of the carriers the Commission made full findings of fact, in which it found that the circumstances and conditions were similar with respect to all traffic handled in the switching district. These findings are conclusive and beyond the power of the courts to review.

All presumptions are in favor of the validity of the order. *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 454; *I. C. C.* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 110.

I. C. C. v. *I. C. R. R. Co.*, 215 U. S. 452, 470, 477, 478:

> Power to make the order and not the mere expediency or wisdom of having made it is the question.

I. C. C. v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547:

> In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have a

similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441.

Unless a controlling question of law was clearly erroneously decided the order will stand. *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494.

I. C. R. R. Co. v. *I. C. C.*, 206 U. S. 441, 457, 459, 466:

> In all these cases, therefore, there was a single, distinct, and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. * * * And the propositions of appellant are inferences of mixed law and fact, hence disputable, may be overcome or counterpoised, and, therefore, the court in reaching its ultimate judgment may have given them all the weight to which they were entitled. * * * The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we can not see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded.

C. H. & D. Ry. Co. v. *I. C. C.*, 206 U. S. 142, 154:

> The statute gives prima facie effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court we think they should not be interfered with,

> unless the record establishes that clear and unmistakable error has been committed. (Cited with approval in *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 466.)

Competition and the weight to be given to it do not present questions of law.

I. C. R. R. Co. v. *I. C. C.*, 206 U. S. 441, 465:

> It must not be overlooked that the Commission and the Circuit Court found that the advance in the case at bar was made by agreement between the roads, and was not the individual action of each, induced by competition. It is true the contrary fact is asserted. It is asserted that such action was the result of competition, and that the "legal value" to which competition was entitled was not given it. The argument to support the contention has not convinced us. The inquiry was essentially one of fact, and the attempt to make competition an inference of law and dominating against the findings of the Commission and their affirmance by the Circuit Court we have already rejected.

United States v. *L. & N. R. R. Co.*, 235 U. S. 314, was a case in which it was sought to make competition the controlling question of law, and it was held that even though the facts before the Commission were undisputed, nevertheless the conclusions reached by the Commission on such undisputed facts should not be disturbed by the courts. The Chief Justice said (320):

> The Commerce Court, finding that there was no conflicting or disputed evidence concerning

the origin and character of the reshipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact but a question of law upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations because the privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. A preemptory injunction was allowed restraining the enforcement of the order of the Commission. And the correctness of this action is the question here for decision.

In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., &c., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29. And the amendments by which it came to pass

> that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

See also *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88; *A., T. & S. F. Ry. Co.* v. *United States*, 231 U. S. 736; *Pre-cooling case*, 232 U. S. 199; *Los Angeles Switching case*, 234 U. S. 294; *Penn. R. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R. Co.* v. *United States*, 238 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *United States* v. *M. & M. Traffic Asso.*, 242 U. S. 178.

Circuit Judge Pritchard, in denying the motion for injunction, said (Tr. 78):

> We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous"; also as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circum-

stances and conditions." *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197. While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. *I. C. C.* v. *Ill. Cent. R. Co.*, 215 U. S. 452; *I. C. C.* v. *D. L. & W.*, 220 U. S. 235; *Pa. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *L. & N. R. Co.*, 235 U. S. 314.

The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law.

II.

THE PHRASE "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS" AS WRITTEN IN SECTION 2 REFERS TO MATTERS OF CARRIAGE AND DOES NOT INCLUDE COMPETITION.

Assuming, for the purposes of the argument only, that clear, free, and unrestricted competition existed and had been practiced among the several carriers at distant points of origin for traffic to be transported and delivered within the Richmond switching district, that would avail the appellants nothing, as such competition would not, under section 2, justify the condemned discrimination, and the Commission and the District Court committed no error of law in so holding.

The Commission said (Tr. 47):

> But we are of the opinion that the present practices of the carriers serving Richmond are unlawful within section 2 of the act.

Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. This treatment, complainant argues, is similar to that condemned by the Supreme Court in *Wight* v. *United States*, 167 U. S. 512.

Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination," a

discrimination which is prohibited and declared to be unlawful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment. *Wight* v. *United States, supra; I. C. C.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 146. * * *

As we have shown in the recent case of *Wight* v. *United States*, 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.

We are of the opinion that the principles underlying the Wight case, *supra*, and the Alabama Midland case, *supra*, are controlling here.

The District Court concurred (Tr. 76, 78):

The first question arising in this case is as to whether the industries situated on the following railroads: Richmond, Fredericksburg & Potomac, Seaboard Air Line, Atlantic Coast Line, Chesapeake & Ohio, and Southern are to be treated as a unit—that is a group of industries engaged in doing business at Rich-

> mond? If they are, then we think the solution of this problem becomes comparatively easy. All the shipments in question are billed to and received at Richmond, and are therefore similarly situated. It was obviously the intention of Congress in the enactment of section 2, above quoted, to secure precisely the same kind of treatment for all industries that are similarly situated. We think that the case of *Wight* v. *United States, supra*, and *I. C. C.* v. *Alabama Midland Railroad Company, supra*, are decisive of the points involved in this question.

Wight v. *United States* was a prosecution under section 2. The defense was that the competition between two rival carriers justified the allowance and that the traffic was not under "substantially similar circumstances and conditions." In rejecting that defense the Supreme Court said (517, 518):

> Whatever the Baltimore and Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road—and to forbid it by any device to enforce higher charges against one than another. * * * But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid 15 cents a

> hundred; the other, in fact, but 11½ cents. * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. * * * *For this case it is enough to hold that the phrase as found in section 2 refers to the matter of carriage, and does not include competition.*

It is argued, however, that *Wight* v. *United States* was a criminal case, controlled by the criminal laws, enforced by the criminal court; that here we have a civil suit in a court of equity; that the statute should receive a liberal construction and broader principles should control.

In the enforcement of the statute the principles do not change according as the case is before a criminal court or a court of equity. *Wight* v. *United States* has been cited with approval and the principles therein announced adopted in subsequent civil cases. *I. C. C.* v. *Alabama Midland Ry.*, 168 U. S. 144, a civil suit brought to enforce an order: (166)

> As we have shown in the recent case of *Wight* v. *United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; *and we there held*

that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, *the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition,* but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

Penn. R. R. Co. v. *International Coal Mining Co.*, 173 Fed. Rep. 1, Circuit Court of Appeals for the Third Circuit (Circuit Judges Dallas, Gray, and Buffington): (4)

In *Wight* v. *United States*, 167 U. S. 513, it was sought to differentiate the service performed by the different terminal facilities of the two shippers at their respective warehouses; but the court held these were not the circumstances and conditions of the act, but that the circumstances and conditions the act contemplated were those *which affected the actual carriage of the freight*, using this language:

"It was the purpose of this act to enforce equality between shippers, and it prohibits

any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay."

And that this phrase "circumstances of carriage" was a carefully chosen one, limiting the circumstances to such as affected haulage of freight, is shown in *I. C. C.* v. *Alabama R. Co.*, 168 U. S. 166, where, referring to *Wight* v. *United States, supra*, the court say:

"We there held that the phrase, 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, *and does not include competition between rival routes.*"

It follows, therefore, that if these circumstances and conditions of section 2 are those which affect haulage, and do not include competition between rival routes, they do not include individual elements affecting individual shippers. The purpose of the section is to afford identity of rate for substantial identity of transportation service, and anything that does not aid in determining what is such substantial identity of haulage does not aid in the application of the section.

D., L. & W. R. R. Co. v. *I. C. C.*, 166 Fed. Rep. 499, known as the *Forwarders case*, Circuit Court adopted the reasoning and conclusions expressed in the dissenting opinion of a member of the Commission, viz, "To sum up the decisions under section 2, we find in the *Wight case that competition of a rival carrier is not a differentiating circumstance.*" (512)

I. C. C. v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 253 (reversing 166 Fed. Rep. 499 on other grounds):

> But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of section 2 of the act to regulate commerce was substantially taken from section 90 of the English railway clauses consolidation act of 1845, known as the equality clause. *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce *that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.* It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co.* v. *Sutton*, 1869, L. R. 4 H. L. 226; *Evershed* v. *London & N. W. Ry. Co.*, 1878, 3 App. Cas. 1029; and *Denaby Main Colliery Co.* v. *Manchester, etc., Ry. Co.*, 1885, 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the

> English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, 166.

Lehigh Valley R. R. Co. v. *United States*, 243 U. S. 444, 445, 446:

> If the shipper were the owner, an allowance to him of a percentage upon the freight as an inducement to ship by that line, however honest and however justifiable on commercial principles, would be contrary to the act to regulate commerce as it now stands. Act of June 29, 1906, c. 3591, section 2, 34 Stat. 586, 587, amending section 6 of the original act, etc. See also the original act of February 4, 1887, c. 104, section 2, 24 Stat. 379. *Wight* v. *United States*, 167 U. S. 512. * * * Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

III.

IT IS TOO LATE TO ARGUE THAT THE ORDER IS SO INDEFINITE AND UNCERTAIN THAT IT CAN NOT BE COMPLIED WITH.

On April 28, 1917, the order was entered, effective August 1, 1917 (Tr. 62). Various extensions of the effective date were made (Tr. 64), but none beyond January 1, 1918 (Tr. 65). On November 6, 1917, the

petition was filed. On January 19, 1918, the final opinion and decree dismissing the petition were filed. The order not having been suspended, it presumably had been put in full force and effect when the decree of the court was entered.

By its own terms and by law the order expired by limitation on January 1, 1920. As the obligations imposed by the order appear long since to have been completely discharged by the carriers, to the great relief and satisfaction of the shippers and consignees within the entire switching district of Richmond, it is now rather late to argue to this court that "the order is so indefinite and uncertain that it can not be complied with," and "should be restrained and enjoined for this reason" (Apps. Br. 84).

The decree of the District Court should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

OCTOBER, 1920.

○

In a case of alleged discrimination, findings of fact made by the Interstate Commerce Commission as to the likeness of contemporary transportation services rendered by carriers to different shippers and as to the substantial similarity of the circumstances and conditions in which they were rendered, cannot be disturbed by the courts, where the action of the Commission is neither arbitrary nor in excess of its authority. P. 62.

Each of certain railroads, in transporting carload freight to and from Richmond, made a practice of absorbing the charges for switching between its line and industries on the lines of the other railroads in that city, if the freight moved over its line to or from points served also by the railroads over which it must be switched in Richmond, but refused to absorb such switching charges where this switching service was to be performed by a non-competitive railroad. *Held:* (1) That a ruling of the Interstate Commerce Commission finding the practice discriminatory between shippers and unlawful under § 2 of the Commerce Act, and requiring the carriers to abstain from it and to maintain and apply uniform regulations and practices for the absorption of such switching charges and to collect no higher charges from shippers or receivers of such freight at Richmond than they contemporaneously collected from any other shipper or receiver of such freight there for a like service under substantially similar circumstances and conditions, was not arbitrary or beyond the authority of the Commission; (2) that the order was not too vague and uncertain to be enforced. P. 63.

249 Fed. Rep. 368, affirmed.

THE case is stated in the opinion.

Mr. Claudian B. Northrop and *Mr. Frank W. Gwathmey* for appellants.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Charles W. Needham, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE DAY delivered the opinion of the court.

In this case a petition was filed in the District Court of the United States for the Eastern District of Virginia to enjoin an order of the Interstate Commerce Commission concerning the absorption of switching charges on the lines of the Seaboard Air Line Railway Company, the Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railway Company within the switching limits of these roads as established at Richmond, Virginia.

The Commission's order was made upon a petition of the Richmond Chamber of Commerce averring that the practice of the railroads was discriminatory and unlawful and violative of § 2 of the Act to Regulate Commerce. From the facts found by the Commission it appears that the appellant railroad companies bring freight from the south to Richmond, Virginia, where the same is delivered to industries in the switching limits of that city. If the freight is received at a point served by any two or more of the carriers, the switching charge is absorbed if the freight be delivered on the line of either. But if the delivery is to an industry served only by a non-competitive carrier the switching charge is not absorbed. The Commission illustrated the point by an example: "Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is a local point on the Seaboard. Assume that industries A, B, and C [referring to a diagram] on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's switching

charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

The order complained of directed the three carriers to cease and desist on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Virginia, while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in a supplemental report to be unjustly discriminatory and unlawful within § 2 of the Act to Regulate Commerce; and "to establish, on or before August 1, 1917, . . . and thereafter to maintain and apply uniform regulations and practices for the absorption of charges for the switching of interstate carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions." 44 I. C. C. 455.

The District Court denied the application for an injunction, and ordered that the petition be dismissed. 249 Fed. Rep. 368.

The contention of the appellants is that the carriage is not a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Section 2 of the Act to Regulate Commerce provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered,

in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (24 Stat. 379.)

Upon this controversy the Commission in its report said:

"Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. . . .

"Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a 'like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination,' a discrimination which is prohibited and declared to be unlaw-

ful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment."

We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

The Commission did not hold that switching charges must be always the same. But it did hold that they must be alike where the service was rendered under substantially similar circumstances and conditions. The Commission's report says:

"We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails.

The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the diagram. Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio."

The practice condemned by the Commission, as its report and order show, was that of absorbing switching charges only when the line-haul carrier competes with the switching line; and refusing to absorb such charges when the switching line does not compete with the line-haul carrier; this the Commission held was discrimination within the meaning of § 2 of the Act to Regulate Commerce. We find no occasion to disturb this ruling as arbitrary in character or beyond the authority of the Commission.

We find no merit in the contention that the order of the Commission was too vague and uncertain to be enforced.

Affirmed.

SEABOARD AIR LINE RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 27. Argued October 8, 11, 1920.—Decided November 8, 1920.

A discrimination between shippers, in charges for transportation, otherwise violative of § 2 of the Act to Regulate Commerce, cannot be justified by the exigencies of competition between carriers. P. 62. *Wight* v. *United States*, 167 U. S. 512.

(26,428)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 961.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

1 For Supreme Court, United States of America.

H. TURNER and S. MORTON TURNER, Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

VS.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

From Supreme Court of Georgia.

2 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, the plaintiffs in error, and J. P. Wade, Sheriff of Brooks County, Georgia, the defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any
3 treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said H. Turner and S. Morton Turner as executors of the estate of J. O. Morton, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within (30) thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13 day of March, in the year of our Lord one thousand nine hundred and eighteen.

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by
WM. H. FISH,
Chief Justice Supreme Court
of the State of Georgia.

Filed in office March 13, 1918, W. E. Talley, Deputy Clerk Supreme Court of Georgia.

4 In the Supreme Court of the State of Georgia, October Term, 1917.

UNITED STATES OF AMERICA, *ss:*

To J. P. Wade, Sheriff of Brooks County, Georgia:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of Georgia, wherein H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton Deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia, this 13th day of March, 1918.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Due and legal service of the within citation and of the grant of the writ of error to the Supreme Court of the United States of America, in the case in said citation mentioned, is hereby acknowledged, and all other and further service and notice is hereby waived. This March 13th, 1918.

STANLEY S. BENNET,
Atty. for J. P. Wade, Sheriff of Brooks Co., Ga.

Filed in office March 13, 1918, W. E. Talley, Deputy Clerk Supreme Court of Georgia.

5 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

On this the 13th day of March, A. D. 1918, came on to be heard the application of H. Turner and S. Morton Turner as Executors of the estate of J. O. Morton, deceased, for a writ of error in the above stated case, and it appearing that the application ought to be granted, it is therefore ordered, that the writ of error be allowed, the plaintiff in error giving a bond conditioned as the law directs in the sum of five hundred dollars, which is to operate as a supersedeas, and that a true copy of the record, assignments of error, and all proceedings had in the case in the Supreme Court of the State of Georgia shall be transmitted to the Supreme Court of the United States properly certified as the law directs that the said court may inspect the same and do what according to law should be done.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Filed in Office, March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

6 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Know all men by these presents, that we, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased, the plaintiffs in error, as principal, and W. A. Jones as surety, are held and firmly bound unto J. P. Wade, Sheriff of Brooks County, Georgia, in the sum of Five Hundred ($500) Dollars, to be paid to the said obligee, his successors, representatives and assigns, to the payment of which to be well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this the 13 day of March, 1918.

Whereas the above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse

the judgment rendered in the above entitled action by the Supreme Court of the State of Georgia,

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

H. TURNER, [L. S.]
S. MORTON TURNER, [L. S.]
As Executors of the Estate of
J. O. Morton, Deceased.
W. A. JONES, [L. S.]

7 Hon. William H. Fish, Chief Justice Supreme Court of Georgia:

The attached bond and the surety thereon, tendered by the plaintiffs in error in the case of Turner et al., Executors, v. J. P. Wade, Sheriff, is satisfactory.

STANLEY S. BENNET,
Attorneys for the Defendant in Error, J. P. Wade, Sheriff.

The within and foregoing bond tendered by H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, as principal, and W. A. Jones, as surety, as well as the surety thereon, is hereby approved, and ordered to operate as a supersedeas.

This March 13, 1918.

WM. H. FISH,
Chief Justice Supreme Court of Georgia.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

8 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Decided and Judgment Affirmed February 15th, 1918.

UNITED STATES OF AMERICA, ss:

To the Honorable the Chief Justice of the Supreme Court of the State of Georgia:

Now comes H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, the above named plaintiffs in error,

by their attorneys, John D. Little, Arthur G. Powell, Marion Smith and Max F. Goldstein, and complain and allege that in the above entitled matter, to-wit, the case of H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, plaintiffs in error, v. J. P. Wade, Sheriff of Brooks county, Georgia, defendant in error, on the 15th day of February, 1918, final judgment was rendered against petitioners by the Supreme Court of the State of Georgia, in which final judgment and the proceedings had prior thereunto in said cause certain errors were committed to the prejudice of said H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That said Supreme Court of the State of Georgia is the highest court of the State of Georgia in law or in equity in which a decision in this suit and in this matter could be had.

The plaintiffs in error, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, further show that in said action there was drawn in question the validity of a
9 statute of, and authority exercised under the State of Georgia, on the ground of their being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of their validity, as will appear from the record, proceedings, decision and final judgment in said Supreme Court of the State of Georgia.

Wherefore, the said H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Georgia for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

This 21 day of February, 1918.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Petitioners.

10 In the Supreme Court of the State of Georgia, October Term, 1917.

H. TURNER and S. MORTON TURNER, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. WADE, Sheriff of Brooks County, Georgia, Defendant in Error.

Decided and Judgment Affirmed February 15, 1918.

Assignment of Errors.

Now come H. Turner and S. Morton Turner, in their capacity as Executors of the Estate of J. O. Morton, deceased, the said plaintiffs in error, and respectfully submit that in the record, proceedings,

decision and final judgment of the Supreme Court of the State of Georgia, in the above stated matter, there is manifest error in that, to-wit:

First, that the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an act of the General Assembly of Georgia approved August 14, 1913, (found in Georgia Laws for 1913, pages 123 et seq.) and especially so much of said section of said Act as provides that if the arbitrators selected in pursuance of its provisions for the purpose of adjudging and assessing the value of the tax-payer's property fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax-assessors, the decision of the board of county tax-assessors, (a decision to be made without giving the tax-payer any opportunity to be heard on the question of the value of the property) shall stand affirmed and be binding in the premises, is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,
11 liberty or property without due process of law.

Second, that the Court erred in affirming the judgment of the superior court of Brooks county, Georgia, dismissing the plaintiffs' petition seeking redress against the enforcement of the statute aforesaid and the portion thereof above described, against the petitioners and their property, on oral demurrer, made by the defendant, on the ground that the plaintiffs' petition set forth no cause of action; and in holding that said statute and the portion thereof complained of are constitutional and do not deprive the plaintiffs of their property without due process of law.

Third, that the court erred in holding and deciding that, notwithstanding the plaintiffs in error had not had any opportunity to be heard before the county board of tax-assessors on the question of the value of their property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax-assessors, and notwithstanding it is this decision or finding of the board of county tax-assessors which is being enforced against the plaintiffs in error and their property, and notwithstanding that such enforcement is in pursuance of the provision of said statute, and notwithstanding that the only provisions for any appeal from or review of said decision or finding of said board of county tax-assessors is by demand for an arbitration, and notwithstanding the plaintiffs in error complied fully with the provisions of said statute in attempting to obtain a hearing before and a decision by arbitrators selected in pursuance of said statute, and though by no fault of the plaintiffs in error, but solely because the arbitrators failed to agree within ten days as to how much the ex parte finding of the county board of tax-assessors as to the value of the property for taxation should be reduced—all of the arbitrators who heard the evidence agreeing that it should be reduced in some amount—the only opportunity given them for a hearing on the question of the value

of their property for taxation was by the terms of said statute
12 of no avail or effect in determining or fixing the value of said property for taxation; and notwithstanding the statute in question makes no exception on account of the failure of the arbitrators to agree within ten days or any other exception whereby the question of the value of the property for taxation could be determined after opportunity for hearing, (though the failure to fix and determine the value within the time limited was due to no fault of the tax-payer), but by its terms makes the ex parte decision or finding of the county board of tax-assessors conclusive and binding in said event and substitutes the decision of the tribunal before which no opportunity for hearing is offered for the decision of the tribunal before which it is contemplated that a hearing shall be afforded—that notwithstanding all this is in pursuance of the statute itself, and the statute is being so enforced in the case presented, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment of the Constitution of the United States which forbids any state from *makes* or enforcing any law which deprives any person of his property without due process of law.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Plaintiffs in Error, H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

13 (Endorsed:) In the Supreme Court of the State of Georgia, October Term, 1917. H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, deceased, Plaintiffs in Error, v. J. P. Wade, Sheriff of Brooks County, Georgia, Defendant in Error. Petition for Writ of Error and Assignments of Error Thereon. John D. Little, Arthur G. Powell, Marion Smith, Max F. Goldstein, Attorneys for Petitioners.

14 In the Supreme Court of the State of Georgia, October Term, 1917.

H. Turner and S. Morton Turner, as Executors of the Estate of J. O. Morton, Deceased, Plaintiffs in Error,

v.

J. P. Wade, Sheriff of Brooks County, Georgia, Defendant in Error.

To the Clerk of the Supreme Court of Georgia:

Please make transcript of the following named portions of the record in the above entitled matter and transmit to the Supreme Court of the United States in connection with the writ of error from the

Supreme Court of the United States to the Supreme Court of Georgia therein:

1. The original petition of H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, deceased, and the amendment thereto.
2. The judgment of the superior court of Brooks county, Georgia, rendered May term, 1917, dismissing the plaintiffs' action.
3. The bill of exceptions presented and filed by H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, deceased, certified by the judge of the superior court, together with certificates of the judge and entries of filing thereon.
4. The decision and judgment of the Supreme Court of Georgia and opinion of the Supreme Court of Georgia, including the opinion of the Supreme Court of Georgia which was rendered in the same case at the October term, 1916, upon the interlocutory application for injunction.
5. The petition for writ of error from the Supreme Court of the United States to the Supreme Court of Georgia.
6. The assignments of error filed in connection with said petition.
15 7. The order of the Chief Justice of the Supreme Court of Georgia, allowing the writ of error.
8. The writ of error.
9. The citation to the defendant in error and entries thereon.
10. The bond given by the plaintiff in error.
11. This præcipe for transcript.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Plaintiffs in Error.

This, March 13th, 1918.

Due and legal service of the foregoing præcipe is acknowledged, copy received, and further service waived, this, 13th day of March, 1918.

STANLEY S. BENNET,
Attorneys for J. P. Wade, Sheriff Brooks County, Ga., Defendant in Error.

Filed in office March 13, 1918. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

16 Supreme Court of Georgia.

Atlanta, February 15, 1918.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

S. M. Turner et al., exrs., v. J. P. Wade, sheriff.

This case came before this court upon a writ of error from the

superior court of Brooks county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $10.00.

17 298.

March Term, 1916.

22 Southern.

WADE Sheriff.

v.

TURNER et al., Executors.

Per Curiam:

The sixth section of the tax-equalization act (Acts 1913, p. 123) requires an examination of the returns of the taxpayers of the county by the board of county tax assessors, and it is made their duty to assess and fix the just and fair valuation to be placed on the property returned. When any change is made in the valuation of the property of a taxpayer as fixed by him in his return, such taxpayer must be given notice of such change. If the taxpayer is dissatisfied, he may demand an arbitration and have a hearing before arbitrators as provided in the act. These arbitrators are required to render their decision in ten days, or else the valuation as fixed by the county board shall stand affirmed and shall be binding in the premises. In Vestal v. Edwards, 143 Ga. 368 (85 S. E. 187), section six of the act mentioned above was attacked as violative of the due-process clause of the constitution, for the reason, among others, "that the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax assessors, without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their value, or for any other cause that might
18 interfere to render such arbitration impossible within the time specified in the act." It was held that this part of the act was not obnoxious to the due-process clause of the constitution of this State or of the United States. The principle of the decision announced in that case is controlling, and it was erroneous to grant the injunction.

Judgment reversed. All the Justices concur except Fish, C. J., absent.

19 224.

Supreme Court of Georgia.

Case No. 439.

TURNER et al.

v.

WADE, Sheriff.

Per Curiam:

When this case was before the Supreme Court on a former occasion it was held: "The sixth section of the tax-equalization act (Acts 1913, p. 123) requires an examination of the returns of the taxpayers of the county by the board of county tax-assessors, and it is made their duty to assess and fix the just and fair valuation to be placed on the property returned. When any change is made in the valuation of the property of a taxpayer as fixed by him in his return, such taxpayer must be given notice of such change. If the taxpayer is dissatisfied, he may demand an arbitration and have a hearing before arbitrators as provided in the act. These arbitrators are required to render their decision in ten days, or else the valuation as fixed by the county board shall stand affirmed and shall be binding in the premises. In Vestal v. Edwards, 143 Ga. 368 (85 S. E. 187), section six of the act mentioned above was attacked as violative of the due-process clause of the constitution, for the reason, among others, 'that the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax-
20 assessors without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their value, or for any other cause that might interfere to render such arbitration impossible within the time specified in the act.' It was held that this part of the act was not obnoxious to the due-process clause of the constitution of this State or the United States. The principle of the decision announced in that case is controlling, and it was erroneous to grant the injunction." Wade v. Turner, 146 Ga. 600. After the return of the remittitur, an amendment to the petition was allowed, alleging that the failure of the arbitrators to agree upon the value of the property returned for taxation was not due to any fault of the plaintiff, but was due solely to the fact that each of the arbitrators placed a different valuation upon the property, which was more than that at which the board of equalizers had assessed, and that as none of the arbitrators would recede from his estimate of value, the time was allowed to expire within which the return of the arbitrators should be made, and the assessment by the board of equalizers became final by operation of law. The petition as amended was dismissed on motion. Held, that under the decision heretofore cited, that the sixth section of the tax-equalization act is not repugnant to

the due-process clause of the State and Federal constitutions, there was no error in the judgment dismissing the case on motion.

Judgment affirmed. All the Justices concur.

21 GEORGIA,
Brooks County:

Be it remembered: On April 7th, 1916, H. Turner and S. Morton Turner, as executors of the estate of J. O. Morton, deceased, filed in the Superior Court of Brooks County a petition in equity against J. P. Wade, the sheriff of Brooks County, Georgia; and during the May term, 1917, of said court also, under the approval and allowance of the court, filed an amendment to the petition.

Be it further remembered, that during said term of said court, viz. on the 17th day of May, 1917, His Honor Wm. E. Thomas, Judge of the superior courts of the Southern Circuit, then and there presiding, the defendant moved to dismiss the plaintiffs' petition (as amended) on the ground that the same set forth no cause of action; and on said day and date the court sustained said motion and entered final judgment dismissing said action.

To said judgment, ruling and decision of the court the plaintiffs, then and there excepted, now except and assign the same as error and say that the court erred in sustaining said motion and in dismissing said action on the ground that no cause of action is set forth in said petition.

Now within the time required by law and on this the 22nd day of May, 1917, came the plaintiffs, said H. Turner and S. Morton Turner, as executors of J. O. Morton, deceased, and present this bill of exceptions and pray that the same may be signed and certified that the errors complained of may be considered and corrected.

The sole opposite party, to wit, said J. P. Wade, the sheriff of Brooks County, is named as defendant in error.

There was no evidence to be considered, and no evidence is
22 material to a consideration of the errors complained of. Only the following portions of the record are material to a consideration of the errors complained of and are specified as such, viz:

The original petition.

The amendment thereto.

The judgment of the court at May term 1917 dismissing the action.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Plaintiffs in Error.

I do certify that the foregoing bill of exceptions is true, and contains all the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the Superior Court of Brooks County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the present term of the Supreme Court

that the errors alleged to have been committed may be considered and corrected. Presented May 22, 1917, and held by me without fault of the plaintiffs in error.

Signed this the 7th day of June, 1917.

W. E. THOMAS,
Judge Superior Courts Southern Circuit.

Clerk's Office, Superior Court Brooks County.

Quitman, Ga., June 19, 1917.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case stated therein; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

[SEAL.] W. R. KNIGHT, *Clerk.*

23 (Endorsed:) Case No. 439. March, 1917. Supreme Court of Georgia. Turner et al., exrs., versus Wade, sheriff. Bill of Exceptions. Filed in Office June 21, 1917. W. E. Talley, D. C. S. C. Ga.

Brooks Superior Court.

S. M. TURNER, Executor, et al., Plaintiff- in Error,

vs.

J. P. WADE, Sheriff, Defendant in Error.

Page.

The original petition .....
The Amendment.....
Judgment of the Court.....

GEORGIA,
Brooks County:

To the Superior Court of said County:

The petition of H. Turner and S. Morton Turner, in their capacity as executors of J. O. Morton, shows:

1. That petitioners are the duly qualified executors of the estate of J. O. Morton, deceased, and are citizens of said State and
24 County.

2. The defendant herein is J. P. Wade, Sheriff of said County.

3. For the year 1915 your petitioners, as executors of the estate of J. O. Morton, returned the properties of said estate subject to taxation in said county for taxation to the tax receiver of said county in the manner required by law, and in said return there was included

2826 acres of land which was returned at the value of $35,225.00, known as the city property of said estate at and for the value of $9,000.00.

4. The above lands were returned at their fair market value and constituted the taxable property of said estate subject to taxation in said county.

5. The board of county tax assessors in said county, consisting of C. T. Tillman, R. L. Groover and A. Morrison, purporting to act in pursuance of an act approved August 14th, 1913, found in Georgia Laws for 1913, pages 123 et seq., being the statute commonly known as the statute providing for the system of equalization of taxes, without having any hearing from your petitioners or any other representative of said estate before said board, proceeded to raise and increase the amount of said tax returns in the following respect, to wit: the value of the 2826 acres of farm land was raised from $35,225.00 to $70,650.00 and the value of the city property was raised from $9,000.00 to $10,000.00.

5½. The values this placed upon said property by said board of County assessors aforesaid was unreasonable and beyond its fair market value, and the said values were placed at the figures above named by said board of assessors arbitrarily and capriciously.

6. On the 24th day of June, 1915, said board of county assessors, having made said increase in the figures of said tax returns of petitioners in their representative capacity as aforesaid, gave notice thereof to your petitioners by notice, a copy of which is hereby attached marked exhibit "A."

7. Immediately thereafter, and within ten days, and in accordance with the provisions of section six of the act above recited, your petitioners gave notice to said board that they demanded an arbitration, and gave at the same time the name of their arbitrator, C. H. Ramsey, a citizen of said County.

8. Within three days thereafter said board named as its arbitrator, Robert B. Young, and these two selected as a third, Ed Pedrick.

9. These three, though thus selected as arbitrators, and though undertaking to act as such, never made any finding or came to any agreement or made any report or award or decision.

10. Said arbitrators were freeholders of the county.

11. The said arbitrators not having rendered a decision within ten days from the date of the naming of the arbitrator- by said board, which was named on the first day of July, 1915, the board of assessors held that their decision stood affirmed and was binding in the premises under the provision of the sixth section of the act of the General Assembly above recited and proceeded to enter their assessment of said taxes as final in the case.

12. The County tax assessors of said county in assessing the taxes assessed it on the basis of what it had been thus arbitrarily and unlawfully assessed by the said board of county assessors, and not upon the basis which had been returned by your petitioners.

13. On the 20th day of December, 1915, your petitioners went to W. L. Roberts, tax collector of said county, for the purpose of paying

the taxes due said property, and he demanded of them taxes at the rate at which the property had been assessed by said board of county tax assessors, but petitioners paid to him, instead of the amount he demanded, the sum of $555.02, which was the amount due on the property for its taxes for the year 1915 according to the rate of State and County taxes based upon the value at which said land had been returned for taxation.

14. Petitioners have paid in full all taxes lawfully due by said estate for the year 1915.

15. W. L. Roberts, the tax collector of said county, pro-
26 ceeded thereupon to issue execution against your petitioners in their representative capacity aforesaid, and against the property of said estate, for the remainder of the amount that exists between the $555.02 which your petitioners paid as taxes on said estate and the amount that the said taxes would have been if they had been assessed on the property at the rate of value fixed thereon by said board of county tax assessors, the amount of such fi. fa. being $417.01 and costs thereon.

16. Said fi. fa. was turned over to the defendant herein, the sheriff of said county aforesaid, and he has proceeded to levy the same upon the following property belonging to the said estate of J. O. Morton in the hands of your petitioners as executors to wit: The Southeast corner of block 19, in the southeast section of Quitman, Brooks County, Georgia, said tract footing 105 feet on Washington Street, and running back 75 feet. And unless he is enjoined therefrom, or otherwise prevented by the action of the court, will sell said property under said tax fi. fa., which is illegal and void for the reasons hereinafter set forth.

17. Petitioners show that said fi. fa. is void for the reason that they have paid all taxes due by said estate and lawfully collectible thereon, and because said fi. fa. was issued without any authority of law whatever; however, this statement is qualified by this explanation: said tax collector claims the right to issue said fi. fa. and said sheriff to enforce the same because it is provided in the sixth section of the act of the General Assembly aforesaid that in the event the assessors make corrections in the returns of tax payers and the tax payers demand an arbitration and the arbitrators are appointed, and if said arbitrators fail to make their decision within ten days from the date of the naming of the arbitrators by said board, the decision of said board of assessors shall stand affirmed and be binding in the premises, and that since the said board of assessors made the correction in the returns as has been for valuation recited above, and said arbitrators were appointed and failed to render a decision within ten days, that the finding of said board of
assessors is binding and controlling upon these petitioners,
27 and upon the tax collector and the sheriff in their official capacity as to the value of said property upon which said taxes should be assessed and paid.

18. Petitioners show to the court that to allow said assessment made by said board of assessors to stand, and to allow said execution

to proceed against said property, and for the court to give effect to that portion of the sixth section of the act aforesaid which provides in effect that in the event the arbitrators shall fail to make a decision within ten days the decision of the county board of tax assessors shall be final and binding, would be to take the property of these petitioners held in their representative capacity without due process of law in violation of article 1, section 1, paragraph 3, of the Constitution of this State, found in section 6359 of the Code of this State, which provides that no person shall be deprived of life, liberty or property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States wherein it is provided—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

19. Petitioners further show that said execution is proceeding against them in their representative capacity as aforesaid, and the property of said estate in their hands aforesaid, is about to be taken thereunder without due process of law, in violation of the provisions of the Constitutions of the State of Georgia and of the United States respectively, cited and referred to above, for the following reasons: the assessment referred to above was made by said county board of tax assessors without notice to your petitioners or any one else representing said estate, and without opportunity to them to be heard, and without there being any provision of law by which such notice could be given or such opportunity to be heard afforded. The Statute under which said board acted does not contemplate or provide for giving the tax payer a hearing before said board, but contemplates and provides that such hearing, or proceeding
28 in the nature of a hearing, as is to be had or afforded shall be before the arbitrators provided for in said statute, and this is the only opportunity for hearing which the statute contemplates or which was in fact afforded to your petitioners or said estate. The increase in valuation, upon the returns for taxation made by your petitioners as aforesaid, is not the result of any finding, judgment or decision rendered by said board of arbitrators, nor has said board of arbitrators rendered any decision or finding in any wise varying the valuation stated in the return made by petitioners but is solely the result of the act of said county board of tax assessors in increasing said return without notice and opportunity to be heard. Notwithstanding your petitioners have resorted to every means available, under the law of said State, and especially said statute, they have not been able to have said valuation adjudged or decided upon, or to have the action of said board of assessors in relation thereto reviewed or passed upon; and there is no provision in the law of said State by which petitioners could compel or obtain such judgment, decision or review by said board of arbitrators, they having failed, without fault on the part of petitioners, to render any finding, judgment or decision within the time presented in said statute.

20. Petitioners, therefore, further show that, since they have paid all taxes lawfully due upon said property at the fair and just valuation at which it was returned, and since said tax *executors* was issued and is about to be enforced for the sole purpose of compelling petitioners to pay tax upon the increase in valuation put thereon by said county board of tax assessors, without notice or opportunity to them or to said estate to be heard in relation thereto, said execution is void, and its enforcement would take the property of petitioners as representatives of said estate without due process of law in violation of the provisions of the Constitution of the State of Georgia and of the United States respectively cited, and quoted above.

21. Petitioners aver and assert that said act of the General Assembly referred to above, and especially so much of the Sixth section thereof as provides in substance that if the arbitrators
29 selected in pursuance of its provisions fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax assessors, the decision of said board of assessors shall stand affirmed and shall be binding in the premises, is unconstitutional, null and void because violative of the provisions of the Constitution of the State of Georgia, and of the United States, respectively, which have been cited, set forth and quoted above, for all the reasons set forth in the three proceeding paragraphs of this petition, and for the further reason that upon the question as to the valuation of the property upon which advalorum taxes are to be assessed (a question upon which, under each and both of the Constitutional provisions aforesaid, the tax payer whose property is undervalued, has the right to be heard before such question shall be foreclosed against him) the statute in question, and especially the particular portions specified above, makes the finding of the board of assessors, made without provision for such hearing, binding and conclusive of the question, in a case which is likely to arise, and which did in fact arise to the detriment of your petitioners in respect to the taxation now in question, namely where the arbitrators without fault of the tax payer fail to render a decision within the time prescribed in said act; so that under the provisions of the act aforesaid, the decision of the question of the contested valuation, which is given effect under said provisions of said statute, is not the decision of the board of arbitrators before which opportunity to be heard is given but the board of assessors, before which no opportunity to be heard is given.

22. Petitioners further show that the right to issue and to enforce said execution is claimed solely by reason of the provisions of said statute which is herein attached as being unconstitutional, null and void.

23. The Lands to which this controversy relates and to which the taxes relate are described as follows: The Plantation in Brooks County, Georgia, known as the J. O. Morton plantation, containing 2826 acres, and certain property in Quitman, Georgia, de-

30 scribed as follows: Block 20 in the southeast section of the said city of Quitman, bounded on the East by Washington and on the West by Lee Street; the southeast corner of block 19, in the southeast section; block 31 (except the northeast quarter) in the northeast section of the city of Quitman, said tract being bounded on the west by Jefferson Street, on the Southeast corner of Block 30 of the northeast section of the City of Quitman, said tract being occupied by Mrs. Nims.

24. Petitioners have no adequate remedy at law: Wherefore, they pray that the defendant, J. P. Wade, sheriff as aforesaid, be enjoined, both temporarily and permanently from attempting to execute said void fi. fa., or from selling or attempting to sell any of the property of said estate under said fi. fa., and specifically from selling or undertaking to sell the property upon which he has already levied as aforesaid under said fi. fa., and that process do issue requiring the said J. P. Wade, sheriff as aforesaid, to be and appear at the next term of said Superior Court to answer this complaint.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Petitioners' Attorneys.

GEORGIA,
Brooks County:

To *Mr.* Est. J. O. Morton:

The Local Board of County Assessors in pursuance of the duties imposed upon it by the Act approved August 14, 1913, has carefully scrutinized all of the tax returns, both personal and real, made by the tax payers of the County, and it finds that your return in respect to this item, to wit: 2826 acres 35,225 to 70,650 $25.00 per acre City property 9000 to 10,000, as to the value of $44,225, is not returned on equality with like property in the county, and is below the fair market value of such property; now, therefore, in order to comply with the requirements of said Act, so that each taxpayer
31 shall pay his proportionate share of taxation, the Board adjudges that the property above mentioned is of the value of $80,650, and it is hereby valued and assessed at that amount for taxation for the year 1915. Ten days allowed from this date to make complaint if not satisfied.

In Witness Whereof, we have set our hand and seal this 24th day of June, 1915.

LOCAL BOARD COUNTY ASSESSORS
BROOKS COUNTY. [SEAL.]

By Order of the Board.

J. W. PATE,
Clerk Board County Assessors.

Room 46 First National Bank Building, Quitman, Ga.

GEORGIA,
Colquitt County:

Personally appeared before me, S. Morton Turner, one of the petitioners, who on oath says that the facts stated in the foregoing petition, so far as come within his knowledge are true, and so far as derived from the knowledge of others he believes them to be true.

S. M. TURNER.

Sworn to and subscribed before me, this the 6th day of April, 1916.

W. E. THOMAS,
Judge S. C. S. C.

At Chambers, Valdosta, Georgia, 6th Day of April, 1916.

The foregoing petition read and sanctioned. Let the same be filed. Let the defendant, J. P. Wade, sheriff of Brooks County, Georgia, show cause before me at Quitman on the 27th day of May, 1916, why the injunction should not be granted, and in the meantime and until otherwise ordered he is enjoined and restrained as prayed for in the petition.

This the 6th day of April, 1916.

W. E. THOMAS,
J. S. C. S. C.

32 *Amendment.*

In Superior Court, Brooks County.

H. TURNER, Executor, et al.

vs.

J. P. WADE, Sheriff.

The Plaintiffs, with leave of the Court, amend their petition by adding to paragraph nine the following:

The failure of the arbitrators to come to any agreement and to make any report or award or decision in said matter was due to no fault of petitioners, or either of them, but [illegible]ne about solely by reason of the following fact: C. H. Ramsey, [illegible]e arbitrator selected by petitioners, was of the opinion that the value of the property involved for taxation should be fixed at $50,000.00, and no more, and so voted in the deliberations of said board of arbitrators. R. B. Young, the arbitrator appointed by the county board of tax assessors, was of the opinion that the value of the property should be reduced to $66,000.00, and so voted. Ed Pedrick, the other arbitrator, thought that the value of the property should be reduced to and fixed at $63,000.00, and so voted, and by reason of the fact that none of the three would yield their views in favor of the others, no award could

be made. And the arbitrators having come to an irreconcilable failure to agree, the ten days fixed by the statute expired with the matter in this situation, namely: that all three of the arbitrators agreed that the sum assessed by the board of tax assessors should be reduced, but no two of them could agree upon the amount to which it should be reduced, and under the provisions of the statute it took the concurrent vote of a majority of said board of arbitrators to make an award.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Petitioners.

GEORGIA,
Brooks County:

Personally appeared before me, S. M. Turner, one of the petitioners, who on oath says that the facts set out in the foregoing amendment are true.

S. M. TURNER.

33 Sworn to and subscribed before me, this the 10 day of May, 1917.

W. R. KNIGHT,
Clerk Superior Court Brooks County, Georgia.

Brooks Superior Court, in May Term, 1917.

The foregoing amendment is allowed and ordered filed.

W. E. THOMAS,
J. S. C. S. C.

In Brooks Superior Court.

H. TURNER, Executor, et al.

vs.

J. P. WADE, Sheriff.

Petition in Equity.

Now, at the May Term, 1917, of said court, the defendant having moved to dismiss the plaintiffs' petition on the ground that the same sets forth no cause of action, it is

Ordered that the motion is sustained, and said suit is dismissed, and that the defendant recover of the plaintiff for the use of the officers of the court the sum of $— costs.

In Open Court, this 16th day of May, 1917.

W. E. THOMAS,
Judge Superior Court, Southern Cir.

BENNET & HARRELL,
Attorneys for Defendant.

Clerk's Office, Superior Court of Brooks County.

Quitman, Ga., June 19, 1917.

I hereby certify that the foregoing pages hereto attached contain a true and complete transcript of such parts of the record in the case therein stated as are in the bill of exceptions specified; and that the May term of said court at which said case was tried adjourned on the 17 day of May, 1917.

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Witness my signature and the seal of said court hereto affixed, the day and year first above written.

[SEAL.] W. R. KNIGHT, *Clerk.*

(Endorsed:) Case No. 439. March Term, 1917. Supreme Court of Georgia. S. M. Turner et al., Exrs., versus J. P. Wade, Sheriff. Transcript of Record. Filed in office June 21, 1917. W. E. Talley, D. C. S. C. Ga.

35

Supreme Court of the State of Georgia.

Clerk's Office.

Atlanta, March 28, 1918.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, citation and acknowledgment of service, also a true and complete transcript of those parts of the record in the case of H. Turner and S. Morton Turner, as executors of the estate of J. O. Morton, deceased, plaintiffs in error, versus J. P. Wade, sheriff of Brooks County, Georgia, defendant in error, which are required by the præcipe of the petitioner for writ of error in said case to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of the State of Georgia.

Endorsed on cover: File No. 26,428. Georgia Supreme Court. Term No. 961. H. Turner and S. Morton Turner, executors of the estate of J. O. Morton, deceased, plaintiffs in error, vs. J. P. Wade, Sheriff of Brooks County, Georgia. Filed April 11th, 1918. File No. 26,428.

In the Supreme Court of the United States

OCTOBER TERM, 1917

No. 961

H. TURNER and S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, Deceased,
Plaintiffs in Error,
vs.
J. P. WADE, Sheriff of Brooks County, Georgia.

In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT BY JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH AND MAX F. GOLDSTEIN, COUNSEL IN BEHALF OF THE PLAINTIFFS IN ERROR.

Abstract and Statement of the Case.

The case involves solely the constitutionality of the sixth section of what is known as the "Tax Equalization Act" of the State of Georgia—Georgia Laws of 1913, p. 127.

This enactment is as follows:

"Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

"If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county,

give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises. Said arbitration shall be had and the said arbitrator shall be compensated in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.

"Before entering upon a hearing, the said arbitrators shall take an oath before the Tax Receiver that they will faithfully and impartially make a true and just assessment of the tax returns and property in question and will determine the matters submitted to them, according to law and the justice and equity of the case."

The portion of this statute to which the constitutional objection specifically relates is that wherein it is provided that if the arbitrators who are selected to hear the controversy arising upon a dispute as to the value of the property for taxation fail to agree within 10 days, the amount assessed by the board of county tax-assessors, who act ex parte and without giving the parties any opportunity to be heard, shall be final and conclusive.

The facts, as disclosed in the record, are:

The plaintiffs in error returned their property for taxation at the value of $44,225.00. The county board of tax-assessors, ex parte and without hearing, raised this amount to $80,650.00. Thereupon, in pursuance of the statute, quoted above, they notified the plaintiffs in error of the increase. Within the time provided for by the statute they demanded arbitration and named an arbitrator. The board selected its arbitrator and these two selected the third, as provided by the statute.

The arbitrators met. All of them agreed that the value assessed by the board was excessive. The arbitrator named by the plaintiffs in error voted to fix the value at $50,000.00. The arbitrator named by the board voted to fix it at $66,000.00. The third arbitrator voted to fix it at $63,000.00. No one of them would recede from his position. The matter stood thus until "ten days from the date of the naming of the arbitrator by said board" expired. Whereupon the command of the statute was that "the decision of said board shall stand affirmed and shall be binding in the premises."

The tax-collector demanded the taxes in accordance with the value fixed by the board of county tax-assessors, namely $80,650.00. The plaintiffs in error paid the amount they conceded to be due; i. e., the sum to which the taxes would amount calculated upon the sum which they had returned them as being the true market value of the property, and refused to pay the remainder. The tax-collector issued execution for the taxes on this increase in value which had been imposed by the board

of county tax-assessors. Thereupon the plaintiffs in error brought their petition in equity to prevent the enforcement of the execution, setting up that the law by which this increase had been thus assessed against them was unconstitutional.

The judge of the superior court, acting as chancellor, on interlocutory hearing, held the statute to be unconstitutional and granted an **ad interim** injunction. The Supreme Court of Georgia reversed this action of the chancellor, holding in the opinion, which appears on page 9 of the transcript of the record in this court, that the statute was not unconstitutional.

Thereupon the defendant moved the trial court to dismiss the petition, because no cause of action was set forth, and the motion was granted. On writ of error to this final judgment the Supreme Court reiterated its former ruling and again held the act to be constitutional. (See transcript, page 10.)

The only question involved, or which has ever been involved in the case is the one decided by the Supreme Court of Georgia and excepted to, namely:

Does the enforcement of this tax-execution against the property of the plaintiffs in error deprive them of their property without due process of law, the statute having provided no opportunity for hearing and decision on the question of the value of the property, before the body that finally and conclusively assessed it; that is to say, is the statutory scheme constitutional?

Specification of Errors Relied On.

First, that the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an act of the General Assembly of Georgia approved August 14, 1913, (found in Georgia Laws for 1913, pages 123, et seq.) and especially so much of said section of said Act as provides that if the arbitrators selected in pursuance of its provisions for the purpose of adjudging and assessing the value of the tax-payer's property fail to make a decision within ten days from the date of the naming of the arbitrators by the county board of tax-assessors, the decision of the board of county tax-assessors (a decision to be made without giving the tax-payer any opportunity to be heard on the question of the value of the property) shall stand affirmed and be binding in the premises, is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

Second; that the court erred in affirming the judgment of the Superior Court of Brooks county, Georgia, dismissing the plaintiffs' petition seeking redress against the enforcement of the statute aforesaid and the portion thereof above described, against the petitioners and their property, on oral demurrer, made by the defendant, on the ground that the plaintiffs' petition set forth no cause of action; and in holding that said statute and the portion

thereof complained of are constitutional and do not deprive the plaintiffs of their property without due process of law.

Third, that the court erred in holding and deciding that notwithstanding the plaintiffs in error had not had any opportunity to be heard before the county board of tax-assessors on the question of the value of their property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax-assessors, and notwithstanding it is this decision or finding of the board of county tax-assessors which is being enforced against the plaintiffs in error and their property, and notwithstanding that such enforcement is in pursuance of the provisions of said statute, and notwithstanding that the only provisions for any appeal from or review of said decision or finding of said board of county tax-assessors is by demand for an arbitration, and notwithstanding the plaintiffs in error complied fully with the provisions of said statute in attempting to obtain a hearing before a decision by arbitrators selected in pursuance of said statute, and though by no fault of the plaintiffs in error, but solely because the arbitrators failed to agree within ten days as to how much the ex parte finding of the county board of tax-assessors as to the value of the property for taxation should be reduced—all of the arbitrators who heard the evidence agreeing that it should be reduced in some amount—the only opportunity given them for a hearing on the question of the value of their property for taxation was by the terms of said statute of no avail or effect in determining or fixing the value of said property

for taxation; and notwithstanding the statute in question makes no exception on account of the failure of the arbitrators to agree within ten days or any other exception whereby the question of the value of the property for taxation could be determined after opportunity for hearing, though the failure to fix and determine the value within the time limited was due to no fault of the taxpayer, but by its terms makes the ex parte decision or finding of the county board of tax-assessors conclusive and binding in said event and substitutes the decision of the tribunal before which no opportunity for hearing is offered for the decision of the tribunal before which it is contemplated that a hearing shall be afforded—that notwithstanding all this is in pursuance of the statute itself, and the statute is being so enforced in the case presented, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment of the Constitution of the United States which forbids any state from making or enforcing any law which deprives any person of his property without due process of law.

Brief of the Argument.

The opinion of the Supreme Court of Georgia rendered in connection with its final judgment in the case (Transcript p. 10; 147 Ga. 666) merely reiterates and reannounces the opinion announced when the case was before the court on exception to the grant of the **ad interim** injunction. The opinion then rendered (Transcript p. 9; 146 Ga. 600) does not argue or discuss the question but

merely cites the case of Vestal vs. Edwards, 143 Ga. 368, as authority for the proposition that the statute in question is not unconstitutional.

While the point here made was not made in the case of Vestal vs. Edwards, and while the point there made was essentially different from the present one, still there is in that case a statement by the court which illustrates the mind of the court on the general proposition involved. This is the statement found in the opening sentence of the second paragraph on page 372 of the opinion as reported in the 143 Georgia Report, viz: "It has been held that in the matter of taxation due process of law does not require a judicial proceeding."

This statement is categorically opposed to the rule announced by the Supreme Court of the United States in the case of Central of Georgia R. Co. vs. Wright, 207 U. S. 127, 138; 52 L. ed. 134, 141 (reversing a decision by the Supreme Court of Georgia) that "Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature."

There can be no doubt of the proposition that where a statute provides for the assessment of taxes without the law itself giving the tax-payer such an opportunity to be heard at some such stage of the proceeding as to make the hearing effective in the determination of the question, there is a violation of the due process clause of the Federal Constitution.

Davidson vs. New Orleans, 96 U. S. 97; 27 L. ed. 616.

Central of Georgia R. Co. vs. Wright, 207 U. S. 127; 52 L. ed. 134.

Mere notice and opportunity for hearing, without more, will not satisfy the requirements of due process of law, if the hearing itself is subject to such limitations as to amount to a deprivation of this right. Regard must be had to substance and not merely to form.

> Fayerweather vs. Ritch, 195 U. S. 276, 297, 299; 49 L. ed. 193, 209, 210.
>
> Chicago R. Co. vs. Chicago, 166 U. S. 226; 41 L. ed. 979.

The question herein presented by the plaintiff in error is one of distinct substance, as well as one of form. The statute, which the Supreme Court of Georgia has held to prescribe the only remedy open to the tax payer, has provided a remedy which on its face, as well as in its practical application to the facts of the case, is seen to be in substance no remedy at all as to a great many cases, including the particular case presented. The tax-payer is given neither notice or opportunity to be heard before the board that assesses the value of the property for taxation. This, however, would not operate as a violation of the tax-payer's constitutional rights, if the law afforded him a method by which he could still compel a hearing and a determination of the question according to due process of law, whether by appeal to some revisory board, body or tribunal or by resort to the courts.

If the statute had provided that the board of county tax-assessors should assess the tax and had directly provided that this assessment should be conclusive, there would be no doubt as to the unconstitutionality of the statute, since this board assesses without notice or hear-

ing. Is the unconstitutionality of the provision making the assessment of this board final and conclusive, cured by another provision whereby the tax-payer may have a hearing before another body, which may or may not pass upon and decide the matter, which may without fault of the tax-payer leave it undecided, but with the condtion annexed that if this body which hears fails to decide within ten days the ex parte decision of the board of assessors shall be final and conclusive?

To state the question in different form: Is due process of law satisfied in a matter requiring action of a judicial or quasi-judicial nature by a provision for a hearing of the question before one tribunal, with the penalty attached that if within a limited period of this tribunal fails to hear it and decide it, even though no fault attach to the complaining party, the party entitled to the hearing shall be conclusively bound by the decision of another tribunal before whom he has had no opportunity to be heard?

The phrase "notice and opportunity to be heard," as used in the cases declaring the essentials of due process of law must, in the very nature of things, carry with it the notion that opportunity to be heard must relate to the decision, judgment, assessment or finding by which the person entitled to the hearing is to be bound.

If the statute had provided for a hearing before the board of county tax-assessors after notice to the tax-payer, with right of appeal to arbitrators after such a hearing and a decision therein, it would then have been competent for the legislation to declare that if the arbitrators failed to change the finding of the board within

ten days the action of the board should be conclusive. This is true because when there is a provision for a hearing after notice and for decision thereon, due process of law does not require that there should be also a right of appeal; hence, the scope of the rights of appeal in such cases may be limited according to the legislative whim or discretion. In such a case the decision which would become final, if the appeal proved abortive, would be the decision of a tribunal which had afforded an opportunity to be heard. Compare Callan vs. Wilson, 127 U. S. 540; 32 L. ed. 223.

Illustration will demonstrate the essential constitutional delinquency of the statute here involved.

Would any one deny the unconstitutionality of a statute providing that where a grand jury indicts for murder the accused may have a hearing thereon before court and jury, but that if the jury fails to agree within 24 hours (or any other length of time) the ex parte finding of the grand jury shall be taken as conclusive and binding and the defendant shall be sentenced accordingly?

Or if a statute provided that where action is begun against a defendant by attachment and seizure of the defendant's property, the defendant might file defensive proceedings, but that if by no fault of his the court failed to hear and decide the case within a limited time, the defenses should be dismissed and the attachment become final process conclusive upon the defendant for the amount claimed therein?

In neither of these supposed cases could it be said that the defendant had not been afforded notice or opportunity to be heard, if we consider merely the form and not the substance; and yet who would say that such an opportunity for hearing satisfied the defendant's constitutional guarantees?

The facts appearing in this record show not only that the statute in question **may** operate to deprive a party of his property without due process of law, but that the enforcement of it in the present case will actually produce that result.

The board of county tax-assessors without notice or hearing or opportunity for hearing, assessed a value alleged by the petition (and by the demurrer admitted) to be in excess of the true value of the property. The tax-payer acted promptly and took every step afforded by the statute to obtain a hearing and a decision as to the true value. The arbitrators—the tribunal provided for by the statute—after hearing the evidence unanimously agreed upon one point, namely, that the tax-payer is entitled to have the assessment materially reduced, but failed to make a finding which can be given effect under the statute, simply because they disagreed as to the specific amount by which the reduction should be made. The tax-payer has done all he can do under the statute. Nevertheless, after he has paid the taxes on his property at its true value, execution has been issued and is about to take his property to pay the taxes on this excess; solely for the reason that the statute so commands. Appeal has been made to equity; and the Supreme Court of Geor-

gia has held that equity cannot give relief because the statute says that the finding of the board of assessors is final and conclusive. So that unless this court gives relief by holding that the statute is unconstitutional, this party must give up his money or property to pay taxes on an excess of value established by no other means than the ex parte assessment of a board that had not heard the facts.

The crux of our contention is that due process of law involves not only notice and opportunity to be heard, but also a decision, finding or judgment, based thereon; that due process of law is a matter of substance and not merely one of form.

John A. Little
Arthur G. Powell
Marion Smith
Max F. Goldstein

Counsel for Plaintiffs in Error, H. Turner and S. Morton Turner, Executors of the Estate of J. O. Morton, Deceased.

IN THE

Supreme Court of the United States

MARCH TERM 1918

No. 80

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. O. MORTON, DECEASED,
Plaintiffs in Error,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GA.,
Defendant in Error.

In Error to the Supreme Court of the State of Georgia

BRIEF BY CLIFFORD WALKER, ATTORNEY-GENERAL, AND BENNETT & HARRELL, COUNSEL, ON BEHALF OF DEFENDANT IN ERROR.

The case is fairly stated in the brief of Counsel for Plaintiffs in Error.

An act of the Legislature, which has for its object the equalization of taxation by means of a fair and just assessment of property returned for taxation, and which provides for notice to any tax payer whose returns have been increased, and that if he is dissatisfied with the action of the county board of tax assessors in assessing the value of his property for taxation, he may demand an arbitration of the question of the valuation of the property returned for taxation, and which provides that in case of disagreement as to the selection of an umpire the county commissioners shall appoint one, the arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board is not repugnant to the due process clause of the Constitution of the United States as contained in the fourteenth amendment.

(a) Nor is it obnoxious to the due process clause of the Constitution of the State of Georgia.

(b) Nor does it deprive the tax payers of the equal protection of the law. Vestel vs. Edwards et al., 143 Ga., 368.

The registration law is not repugnant to the Fourteenth Amendment to the U. S. Constitution on the ground that it does not provide an appeal to the Superior Court from the registrars upon the question of the payment of taxes by a tax payer and voter, and therefore denies to the voter and tax payer due process of law and equal protection of the law. Bedden et al. vs. Davies et al., 139 Ga., 635.

The charter of the City of Elberton which provides for the assessment and valuation of property for taxation by a board of assessors, and requires notice to the tax payer

and an opportunity to be heard, and that the assessment shall be fixed according to the facts developed at said hearing, if one is had, is not unconstitutional as depriving the tax payer of due process of law. Van Duzer vs. Iram, 138 Ga., 534.

Charter of the City of Tallapoosa which provides that if the owner of personal property conceives that the city council has placed too great a value on his property that such owner may have such assessment reviewed by the mayor and council of said city who shall assess said property at its reasonable and just value and their decision shall be final in the premises is not contrary to the constitution of the United States and Georgia which declares no state shall deprive any person of property without due process of law. McWilliams vs. Tallapoosa, 137 Ga., 283.

The value of property for the purpose of assessing municipal taxes, as provided by the charter of the City of Bainbridge, is to be ascertained and determined by the legally constituted authorities established for that purpose in said municipality and not by judicial proceedings; an assessment made in the prescribed mode without fraud or collusion is final and conclusive upon the question of value as a basis of taxation for the time being. Bower vs. City of Bainbridge, 116 Ga., 794.

See Acts of 1910, page 24, Section 4, which provides for arbitration of tax returns.

Acts of 1913, page 123, System of equalization.

Headnote of above, "To provide for just and adequate returns of property for taxation and secure the equitable valuation thereof, etc." Page 125, Section 4, "Upon petition to the judge of the Superior Court by 10 or more freeholders of the county that any one or more of the members of the county board of tax assessors are disqualified, or are not properly and impartially discharging their duties or are discriminating in favor of certain citi-

zens. The judge shall cite the members of the board of tax assessors to appear, etc." Page 127, Section 6, "If in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property and a fair and just valuation, the said board shall correct such returns and assess and fix the just and fair valuation to be placed upon the property.....and the valuations as between the tax payers are fairly and justly equalized so that each tax payer shall pay his proportionate tax." Page 128, arbitration of returns, "The arbitrators shall render their decision within ten days else the decision of said board shall stand affirmed and be binding."

Code 1097, duty of tax receiver carefully scrutinize returns. 1098 give the tax payer notice of raise and arbitrate it.

White vs. Forsythe, 138 Ga., 756, headnote 11, it was held in this case that if the acts of 1902 failed to sufficiently provide for notice to the tax payer that the act of Aug. 13, 1910, page 25, made provisions.

Due process of law not afforded by the Law of Georgia which provides that the valuation of property not returned for taxation made by the assessing officer without notice or opportunity for hearing concludes the tax payer both in the tax proceedings and in the court unless he can show bad faith, etc. Cen. of Ga. vs. Wright, 207 U. S., page 48.

In this country as in England, the necessities of government, the nature of the duties to be performed, and custom and usage, have established a proceedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice but which is still due process of law within the meaning of the Constitution. Kelley vs. City of Pittsburg, 104 U. S., 658.

It is alleged and probably with truth that the estimate of the value of this land for taxation is very greatly

in excess of the true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct in this court the errors and mistakes of the State tribunals on that subject that we can only refer to those decisions without a restatement of the argument. Ibid 659.

The Constitutional provision that no State shall deprive any persón of life, liberty or property without due process of law does not require the person taxed by the law of the State shall be present or have an opportunity to be present when the tax is assessed against them.

Nor does it require that taxes shall be collected by a judicial proceeding. McMillan vs. Anderson, 95 U. S., page 335.

In the case of Central of Georgia Ry. Co. vs. Wm. A. Wright, 207 U. S., 47, it was held that the method pursued in that instance was unconstitutional because it deprived defendant of its property without due process of law because in that instance the defendant had failed to return certain property, claiming that it was not subject to taxation in Georgia. The Comptroller-General insisted that it was and affixed a valuation upon the property, the defendant having no hearing whatever. It was in that instance as the defendant was acting in good faith and did not withhold the property from taxation for the purpose of defrauding the State, but because this species of property had not been subject to taxation for some time in Georgia. That in that instance it was a deprivation of property without due process of law.

In the instant case the property was returned, the valuation raised by the tax assessors, the defendant notified and given a chance to arbitrate. He selected his arbitrator and as the arbitration failed according to law the valuation fixed by the assessors became the proper valuation. In this instance he had due notice and an opportunity to be heard and the failure to obtain the relief

was due doubtless to the fact that the arbitration failed. It is presumed that there was a hearing before the arbitrators and as they could not agree upon the valuation then the valuation fixed by the assessors became the proper valuation.

The court may review the valuation placed on property for taxation, where the record shows that it was imposed in a whimsical, capricious or unwarrantable way instead of by the judgment since such valuation would be no assessment. Consol. Gas Co. vs. Baltimore, 1 L. R. A., 263.

An appeal is not necessary to enable a board of equalization to revise a tax assessment under a statute providing that the board was created for the purpose of revising the assessment when returned by a tax assessor. State N. Bank vs. Memphis, 7 L. R. A., 663.

In the absence of grounds justifying a resort to a court of equity for injunctive relief, the decision of the statutory board of equalization, declining to reduce the assessed valuation of lands, is plenary and final. Finney County vs. Bullard, 16 L. R. A., 807.

The State may subject to the doom of the assessor a tax payer who has failed to furnish a list of his property to the assessor as required by law, but not where the failure to make such returns was without fraudulent intent and from an honest belief, founded upon reasonable grounds that what property he had was not taxable. Travelers Ins. Co. vs. Board of Assessors, 24 L. R. A., 389 (2).

The assessment of property for purposes of taxation is not a judicial function and under the Kansas law providing for an appeal from the county board of equalization to the district court, is unconstitutional and void. 13 L. R. A., 716. See notes under same.

Under the Tennessee statutes, the board of equalization may either increase or reduce assessments; and an

increase is not rendered invalid by the fact that it is made by the board at its own motion, and not in a proceeding had pursuant to an appeal prosecuted by a tax payer. State N. Bank vs. Memphis A. & E. Anne. Cases. Vol. 8, page 22.

The proceeding of a board to equalize taxes, if conducted in good faith and within its jurisdiction, are final and conclusive.

The presumption is in favor of the regularity of the proceeding of commissioners to equalize taxes, and whoever attacks them must show affirmatively qant of jurisdiction. A. & E. Ann. Cases Vol. 8, 595.

Statutes creating boards to review the equalization of taxes by county board are not in contravention of the due process of law clause of the Constitution of the United States because no provision is made of giving notice to tax payers nor do such statutes deny to the tax payer the equal protection of the law within the meaning of the Federal Constitution. Ibid 596.

The Wyoming statutes providing that the county board of equalization "Shall at its first meeting add to said assessment roll any taxable property in that county not and assess the value thereof," give such board full powincluded in the assessment as returned by the assessor er to add omitted taxable property to the roll and assess its value, although the property has not been assessed and the name of the owner does not appear upon the assessment roll until entered thereon by the board. Fred Horton vs. Driskell, A. & E. Ann. Cases, Vol 3, 561.

It is well established that an injunction will not lie to restrain the collection of taxes because of the irregularities or informalities in the assessment thereof. See note to above. See 59 Ga., 805.

CLIFFORD WALKER,
Attorney-General.
BENNETT & HARRELL,
Counsel for Defendant in Error.

Supreme Court, U. S.
FILED
OCT 15 1920
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 29.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. C. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. F. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF BY ARTHUR G. POWELL, COUNSEL FOR PLAINTIFF IN ERROR, IN REPLY TO SUPPLEMENTAL BRIEF FILED BY COUNSEL FOR DEFENDANT IN ERROR.

Filed Under Special Leave of the Court Granted at the Time of the Argument.

(For brevity, statutes already set out in the opposing brief are not again requoted.)

The supplemental brief which has been filed in this case by the defendant in error was not filed or served until counsel were already in Washington for the reargument. It pre-

sents an entirely new theory of the case—a theory not suggested in the argument in any of the State courts in which the case was tried, nor in the former briefs or arguments in this court.

Counsel for defendant in error, now conceding that the provision of the Georgia Tax Act in question which makes the finding of the equalization board (the Board of Tax Assessors) final in the event the arbitrators fail to agree within ten days is unconstitutional unless the equalization board is, by the statute, required to give the taxpayer notice and opportunity to be heard, present in their supplemental brief the new proposition that this court should, by process of judicial interpretation, read into the act a provision (admittedly absent from it so far as any language therein contained is concerned) by which the equalization board is charged with the duty of affording the taxpayer notice and opportunity to be heard.

The objections to this court's giving to the act any such interpretation are:

(1) It would erect a statutory scheme not contemplated by the legislative body in enacting the statute.

(2) Such an interpretation would be contrary to the construction which has been uniformly given to the act hitherto by the actual practice under it.

(3) Such an interpretation would be contrary to the construction which manifestly, by implication, if not by direct language, has been given to the act by the highest court of the State of Georgia.

Considering these propositions in order:

The legislative body of Georgia in enacting this statute manifestly intended to constitute the board of tax-assessors as an inquisitorial agency and not as a judicial or quasi-judicial tribunal. Their duty, like the duty of the Grand

Jury (the common inquisitorial body of the country), is "diligently to inquire," first, and chiefly, as to whether there is taxable property in the county which has not been returned for taxation and, then, whether that which has been returned has been returned at its fair market value.

They are given by section 7 of the act power to subpœna any witnesses or to require the production of books and papers "which may throw any light upon the question of the *existence or liability* of property of any class for taxation.

It is argued that this grant of this power connotes that the tax assessors are charged with the duty of giving taxpayers a hearing. On the contrary, the language shows that it relates to the duty of the tax assessors to seek out unreturned taxable property and to compel its addition to the tax digests. A grand jury is a purely inquisitorial body; and it has this same power as to witnesses, books and papers.

Indeed, in Georgia, prior to 1910, the duty imposed on the tax assessors as to scanning and noting increases in tax returns of individual taxpayers devolved on the grand jury. Sections 1198 and 1199 of the Civil Code of Georgia, which have been superseded, provided:

> §1198. "The tax receiver in each county at each fall term of the superior court in his county, shall lay before the grand jury his returns for that year of taxable property, and the grand jury shall overlook the same; and wherever they find an undervaluation they shall correctly assess it according to the market value of the property and deliver to the receiver his returns with the correction."
>
> §1199. "When the receiver shall receive his returns for the next succeeding year and the corrected returns made by the grand jury, it shall be his guide for that year, and if the taxpayer shall return his

> property below the valuation made by the grand jury, the receiver and taxpayer each shall select an arbitrator; and these two shall select an umpire, to whom the question of valuation shall be referred; and if the arbitrators fail to agree on a valuation of the property, or fail to select an umpire, in thirty days after receiving notice of their appointment, this fact shall be reported to the ordinary or the chairman of the county commissioners (as the case may be), who shall forthwith appoint two arbitrators, who with the arbitrator appointed by the taxpayer shall fix the value of the property, and their award shall be returned to the receiver, and shall be entered by him as the valuation of said taxpayer's property."

This statute remained in force nearly forty years. No one ever assumed that the duty of the grand jury under it was more than inquisitorial, with right to make a provisional finding. No one ever assumed that the grand jury was under any duty to give the taxpayer a hearing. Due process of law was afforded the taxpayer through the provision for arbitration under section 1199 just quoted.

In 1910 (Georgia Laws, 1910, p. 24) an act was passed, the material provisions of which are as follows:

> SEC. 4. "Where the property subject to said tax is such as is returnable annually to the tax receiver of the county, that officer shall assess the same at the valuation fixed in the annual returns, if satisfactory to him; if not, he shall within 30 days after receiving said returns, make an assessment of said property from the best information he can procure, and notify, in writing, the person or officer making the returns, who shall have the privilege within 20 days after receiving such notice, to refer the question of the true value to arbitrators, one to be chosen by him-

self and one to be chosen by the tax receiver, with power to choose an umpire in case of disagreement, and their award shall be final. * * * Should the taxpayer desire to contest the taxability of said property under this section, he may do so by petition in equity in the superior court of the county where said property is assessed. Should the two arbitrators provided for in this section fail to agree upon the value of the property, and fail to name an umpire within 20 days after their appointment, the umpire shall be named by the ordinary or county board of commissioners, as the case may be."

In the act of 1913, now before us, the legislature merely intended to transfer to the board of tax assessors this function formerly given to the grand jury and later to the tax receiver. And it has always so been understood in Georgia.

Now for this court to hold that the legislature intended for this board of tax assessors to hold public hearings, and that every person, resident or non-resident, having taxable property in the county should be on the *qui vive* from the 10th of May to the 1st of July of each year, in order to be heard if the board should be of the opinion that he had property which he had not returned or of the opinion that the value stated in the return he had made was too low, would be to convert this board which the legislature intended to function only through *ex parte* investigation and the instigation of the proceedings by which property should be added to the tax lists or the value of returned property should be increased, into a quasi-judicial tribunal, on the sittings of which every person who had property in the State must attend or from which he should be absent at his peril. The taxpayers of a county do not necessarily reside in the county. Residents and non-residents alike would be affected. The legislature manifestly did not intend to provide any such system; and the courts should not give to the law an

interpretation which would read any such a system into it.

The language of the act does not authorize the interpretation which our able adversaries ask this court to place on it. If it had been intended that this board of assessors should have public hearings and that it should give the taxpayers opportunity to be heard, it would have been easy to say so. If the legislature had intended that the tax assessors should give the taxpayer a hearing and thereby satisfy the requirement of due process of law as to him, there would have been no need for the provision by which the board must notify him of its action after it has been taken and for the hearing before arbitrators.

If the court will now turn to the case of *Central of Georgia R. Co. vs. Wright*, 207 U. S., 127; 52 L. Ed., 134, it will find there quoted, in connection with the opinion, the Georgia statute by which corporate property is returned and assessed. In Georgia, corporate property (with certain exceptions) is returned to the Comptroller-General; the property of individuals to the tax receiver. As to corporate returns, the Comptroller-General performs the functions performed by the tax assessors as to individual returns. It is to be seen that the language of the statute under review in the case of *Central Railroad vs. Wright, supra*, is practically identical at salient points with the language of the statute now *sub judice*. This court there held that while that act may have allowed the Comptroller-General to give the taxpayer a hearing as a matter of grace, it did not afford a hearing as a matter of right. That statute provided, as does the present statute, for an arbitration, but made the finding of the Comptroller-General final in certain instances. Likewise, this statute provides for an arbitration but makes the finding of the tax assessors final in certain instances. In that case which fell within the category which made the decision of the Comptroller-General final, the court held the statute *pro tanto* unconstitutional. In this case, which falls within the

category which makes the decision of the tax assessors, performing the identical function, final, we urge a like result.

As to the third point, that actual practice under the act has been contrary to the construction here sought by the defendant in error, we do not understand that there is any dispute as between counsel. We understood the able Assistant Attorney-General of Georgia to concede in his argument that as a matter of practice these boards of tax assessors have not hitherto given such hearings (except in rare instances as a matter of grace) and have not considered themselves as bound to give any such hearing.

The thing most potent with this court is the construction given to the act by the Supreme Court of Georgia. If one will read the petition in equity filed by the taxpayer in this case, and will keep in mind that the petition was dismissed on motion to strike, in the nature of general demurrer (all the allegations of the petition being thereby admitted, under the Georgia practice) and will then read the short opinion of the court, one will have no serious doubt as to the construction implicitly put on the act by the Georgia court.

The petition alleged in par. 5 (Tr., print, p. 13) that the tax assessors acted "without having any hearing from your petitioners;" also in par. 19 (Tr., print, p. 15) "the assessment referred to was made by said county board of tax assessors without notice to your petitioners or to any one else representing said estate, and without opportunity to them to be heard, and without there being any provision of law by which such notice could be given or such opportunity to be heard afforded. The statute under which said board acted does not contemplate or provide for giving the taxpayer a hearing before said board, but contemplates and provides that such hearing, or proceeding in the nature of a hearing, as is to be had or afforded shall be before the arbitrators provided for in said statute, and this is the only opportunity for hearing which the statute contemplates or

which was in fact afforded to your petitioners or said estate."

The petition sets out fully the construction given to the act by the petition, and points out the particular feature by which he claims to have been deprived of his constitutional rights.

When the Supreme Court of Georgia came to pass on the matter, it in no wise challenged these statements (neither statements of fact, which it could not have challenged, since the sustaining of the motion to dismiss rendered them judicially indisputable, nor statements of the meaning and operation of the statute).

The court makes no mention or suggestion of any opportunity to be heard before the tax assessors. On the contrary, the opinion recites that the act requires of the tax-assessors an "examination of the returns" and a duty to "assess." "When any change is made * * * such taxpayer must be given *notice of such change*. If the taxpayer is dissatisfied, he may demand an arbitration and *have a hearing before arbitrators.*"

If the court had construed the act as giving the taxpayer opportunity to be heard before the assessors, a simple statement of that fact would have ended the case; except that in that event the court would have reversed the judgment for errorr of the tax assessors in not giving a hearing, since the petition alleged that they had failed to give such a hearing.

The court cites *Vestal vs. Edwards,* 143 Ga., 368. That case is fuller and shows even more clearly that the court did not consider the act as giving a hearing before the assessors. The first headnote (and, in Georgia, under Civil Code §6202, the headnote or syllabus is the real decision of the court, and the opinion is merely elaboration) in that case describes the act just as we have described it. Neither in the headnotes nor in the opinion is there any suggestion of a hearing before the tax assessors. (See also the court's

summary of the provisions of the act on p. 372 of the opinion.) Throughout the opinion the court having before it the question of "due process of law," in that connection elaborates only the provisions as to the arbitration. The court cites §§1097 *et seq.* of the Code, which is the statutory scheme of increasing undervalued returns by action of the tax receiver with provision for arbitration, the material portions of which have been previously quoted in this brief. The court also refers to the act of 1910. That act is entitled:

> "An act to provide for a method of assessing and collecting taxes where such taxes are authorized, and no adequate provision is made in the act authorizing the same, or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property subject thereto."

The provision of that act referred to by the court has been quoted above in this brief.

On page 374 of the opinion the court reads the provisions of this statute into the act of 1913; thereby plainly, though implicitly, holding that the act of 1913 was relieved of repugnance to the Federal Constitution by reason of the provision in the act of 1910 that the ordinary could appoint the third arbitrator or umpire—the delinquency complained of in that case being the lack of provision for a third arbitrator when the two selected failed to agree.

The second division of the opinion in that case is illuminating on the subject before us. It held that the trial judge should have entertained equity jurisdiction and granted the injunction because the arbitrator selected by the assessors was kin to one of the tax assessors, basing the holding on the ground that the tax assessors were parties to the arbitration proceedings. It will hardly be assumed that the legislature of Georgia intended that the same persons who were to be parties in one phase of the proceeding, should be judges, so

to speak, in the other. While such a dual relationship is probably legally possible, it is so foreign to our common sense of propriety and judicial decency as that the court will be slow to read such an interpretation into a legislative act.

This court will endeavor, within limits of fair reasoning, to uphold statutes attacked for repugnancy to the Constitution, though it will not go to limits of legal absurdity to achieve that end. But in this case, plaintiffs in error do not ask the court to destroy the statute, but ask the court merely to limit it in such a way as will render its workings conformable to the Constitution, and will thereby improve it. We attack only so much of the act as makes the *ex parte* finding of the tax assessors final in the event the arbitrators fail to agree within ten days. The Supreme Court of Georgia has upheld this provision and thereupon held that, since the statute gives due process of law, the taxpayer cannot resort to equity under the act of 1910, quoted above, or the general principles of equity jurisprudence; for the act of 1910 gives resort to equity only when, as its title discloses, the existing laws fail to give due process of law. If this court holds this feature of the act unconstitutional, the only change in the system is that the taxpayer, instead of being precluded by the finding of the tax assessors, may pay the tax he concedes to be due in his return and litigate in equity as to whether his return should be increased or not.

We should further notice the opposing supplemental brief to the extent of calling attention to an error. On page 6 of that brief it is said that the tax assessors are county officers and that the Code requires the Ordinary to provide them rooms in the courthouse. We understood our fair opponent to concede in his argument or in answer to the question of one of the justices that he was in error as to this. The tax assessors are not county officers (that being a phrase taken from our Constitution, and in fact do not meet at the courthouse, unless, as sometimes happens, they get permission to use some room there as a convenient meeting place. (See

the notice in the transcript and the last line of print, p. 17.)

The cases cited by opposing counsel are plainly differentiated from the case at bar, which is controlled by *Central R. Co. vs. Wright,* 207 U. S., 127.

For example, in *Lander vs. Mercantile Bank,* 186 U. S., 458; 46 L. Ed., 1247, the board in question was by direct language of the statute required to "hear complainants as to assessments;" and it expressly provided for notice for that purpose.

The same is true as to the statute in question in *Merchants Bank vs. Pennsylvania,* 167 U. S., 461; 42 L. Ed., 236.

In the *Kentucky Railroad Tax Cases,* 115 U. S., 321; 29 L. Ed., 414, the question was whether the hearing afforded by the statute there involved was one of grace or one of right and this court followed an express adjudication of the highest court of the State, holding that the hearing was a matter of right. (See top of page 8 of opposing supplemental brief.)

An examination of the *State Railroad Tax Cases,* 92 U. S., 575; 23 L. Ed., 663, will disclose that those cases did not involve the question here involved, or if it was involved, it had been precluded by the construction given by the Supreme Court of Illinois to its own statute.

In *Pittsburgh R. Co. vs. Backus,* 154 U. S., 421, this court merely followed the decision of the State Supreme Court in holding that the act provided a hearing before the board of assessors as a matter of right and not as a matter of grace.

The case of *Bi-Metallic Inv. Co. vs. State Board of Equalizers,* 239 U. S., 441; 60 L. Ed., 372, deals with an entirely different phase of taxation and is not here in point.

The other cases cited by opposing counsel readily distinguish themselves on similar grounds.

Respectfully submitted,

ARTHUR G. POWELL,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
OCT 8 1920
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 29.

H. TURNER AND S. MORTON TURNER, EXECUTORS OF THE ESTATE OF J. C. MORTON, DECEASED, PLAINTIFFS IN ERROR,

vs.

J. P. WADE, SHERIFF OF BROOKS COUNTY, GEORGIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

SUPPLEMENTAL BRIEF BY R. A. DENNY, ATTORNEY GENERAL OF GEORGIA, AND GRAHAM WRIGHT, ASSISTANT ATTORNEY GENERAL OF GEORGIA, ON BEHALF OF DEFENDANT IN ERROR.

We desire in this supplemental brief to present to the court a theory of this case which has not heretofore been presented in the brief for defendant in error. Stated concisely, the theory or view which we desire to present to the court is this:

The tax equalization law of Georgia, now involved before this court, provides ample notice and opportunity for hearing without the arbitration proceedings therein provided for, in that this law gives the time and place of the meetings of this board of assessors, which this court has repeatedly ruled is sufficient notice to comply with the due-process clause of the Constitution. The arbitration provided for in this law is in the nature of an appeal, which this court has held, and which counsel for plaintiff in error admit, is not essential to due process of law in tax matters.

Under this view of the case, let us analyze for a moment the tax laws of Georgia and the tax equalization act of 1913. Under the Georgia system of taxation all persons are required to make returns of their property for taxation. Code section 1010 of the Code of Georgia, 1910, provides:

> "All property or other thing of value, subject to taxation, must be given in by the tax-payers, as hereafter set forth, at its fair market value and must be taxed according to its value on an assessment to be made by the Governor, with the assistance of the Comptroller General."

The laws of Georgia then provide that the returns of railroads and other corporations (specifically designated) shall be made to the Comptroller General of the State. A citation of the laws requiring these returns is unnecessary, as these returns are not affected by the act of 1913, now before this court.

Code section 1075 of the Code of Georgia, 1910, provides:

> "All other companies or persons taxed shall make their returns of personal property to the receiver of the respective counties where the persons reside or the office of the company is located," etc. (The remainder of this section, being immaterial to the question involved, is not here quoted.)

Code section 1 68 of the Code of Georgia, 1910, provides:

> "All lands in this State, subject to taxation, whether improved or unimproved, shall be returned by the person or persons owning the same, his, her, or their agent or attorney, to the receiver of the county where the land lies," etc. (The remainder of this section, being immaterial to the question, is not here quoted.)

The tax equalization law of 1913 provides the time when the tax receivers of the State (who are county officers and are in each county of the State) shall open and close their books to receive returns and for the disposition of these returns by them.

Section 1 of this act provides (Georgia Laws, 1913, page 123, section 2):

> "* * * That the several tax receivers of this State shall open their books for returns of taxes on the first day of February and shall close the same on the first day of May of each year, and within ten days thereafter it shall be the duty of the tax receiver of each county to present the tax returns of the county for the current year to the county board of tax assessors created by this act for the purposes herein contemplated and provided. * * *" (The remainder of this section, being immaterial to question, is not here quoted.)

The board of county tax assessors created by this act consists of three members, who are sworn and commissioned. Section 5 of this act provides (Georgia Laws, 1913, page 128):

> "That the county board of tax assessors shall elect one of their number as chairman for such term as they shall fix but not to be less than two (2) years. The said board shall have authority to employ a competent person to serve as secretary of said board. He shall keep a record of the proceedings of said board and shall receive for his services in this

capacity the sum of three ($3.00) dollars per day, while actually attending sessions of said board; the same to be paid out of the county treasury in the same manner in which other county payments are made. * * *" (The remainder of this section, being immaterial to the question, is not here quoted.)

Section 6 of this act provides (Georgia Laws, 1913, page 127):

"That the said board of county tax assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the tax receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax-payer, and if in the opinion of the board any tax-payer has omitted from his return any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax-payers are fairly and justly equalized so that each tax-payer shall pay, as near as may be, only his proportionate share of taxes * * *," etc. (The remainder of this section, being immaterial to this question, is not here quoted.)

Section 7 of this act provides (Georgia Laws, 1913, page 128):

"That it shall be the duty of the county board of tax assessors to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper return for taxation.

> "The said board shall have authority to issue subpœnas for the attendance of witnesses and to require the production by any person of all his books, papers and documents, which may throw any light upon the question of the existence or liability of property of any class for taxation. If any witness so subpœnaed shall fail or refuse to produce any such books, papers, or documents, such person * * * punishment as for a contempt * * *." (The remainder of this section, being immaterial to this question, is not here quoted.)

Section 10 of this act provides (Georgia Laws, 1913, page 129):

> "That said county boards of tax assessors shall complete their revision and assessment of the returns of the tax-payers in their respective counties by July 1st of each year." (The remainder of this section, being immaterial to this question, is not here quoted.)

These provisions of the law under attack are, we submit, controlling in this case. They measure up fully to the requirements of due process as laid down by this court, in that they constitute notice of the time and place at which the assessment is to be made. The time is clearly fixed as beginning within ten days after the first day of May and ending on the first day of July. It may be contended that the beginning "within ten days" is not definite enough, but in reply to this we submit the decision of this court in the case of Louder *vs.* Mercantile Bank, 186 U. S., page 458, where, on pages 468 and 469, the court said:

> "We agree with the Court of Appeals that some notice was necessary to be given, and the question occurs, did the statute give notice by fixing the time of the meeting of the board? It seems to be conceded that the statute did so as to the first meeting of the board, and that such notice would have been sufficient as to subsequent adjournments if they had been made to days certain. * * * We do not

> think the principle of those cases is affected by an adjournment of the Ohio board without giving a date of meeting. * * * The board was a public tribunal open to be invoked, and charged with duties and necessarily subject to adjournment. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exercise of a very trifling trouble, the bank would have been informed of every meeting of the board."

The place is likewise clearly fixed by this law. There is a board of assessors for each county of the State. These men composing these boards are county officers. Code section 401, Georgia Code, 1910, provides:

> "Such ordinary shall designate the rooms of the court-house to be occupied by each of the county officers, and enter the same on their minutes, which they may change from time to time as convenience requires."

This court has held, in the case of Andes *vs.* Ely, 158 U. S., pages 313-323:

> "Where a notice fails to name any other place it will be presumed that the place intended is the regular office of the county judge."

And this rule has been applied to the very questions now involved.

In the case of Merchants Bank *vs.* Pennsylvania, 167 U. S., pages 461-466, it was said:

> "The statute defines the time when the bank shall make its report to the auditor general and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provisions to the contrary, to be had at the office of the officer charged with the duties

> * * * and a notice to all property-holders of the time and place at which the assessment is to be made is all that 'due process' requires in respect to the matter of notice in tax proceedings."

We submit, therefore, that this law constitutes notice to every tax-payer of the time and place at which the assessment is to be made.

But one other question could be raised, and that is the right of a tax-payer to complain before this board. While it is true that the act does not in express language confer this right, still that such right exists cannot be questioned from a reading of the sections quoted above. It does not appear from the pleadings that any attempt was made to be heard by this board or that they refused it.

Though the Supreme Court of Georgia has several times passed upon this law, in no case has it held that this board could not hear and consider the evidence of the tax-payer.

In the case of Vestal *vs.* Edwards, 143d Georgia, page 368, the Supreme Court of Georgia held this law to be valid. In this decision it neither held that the board of assessors could or could not hear complaint of the tax-payer, but on pages 372-373 of the decision the intimation is strong that such complaints could be heard by them, and from a reading of the law it seems clear that this must be true. Under these facts we submit that this court will not apply to this law a construction which would render it unconstitutional. In fact, this court has passed upon the identical question here raised in

> The Kentucky Railroad Tax Cases, 115 U. S., page 321,

where this court held:

> "It is said, however, by counsel for the plaintiff in error in argument that whatever was in fact this alleged hearing it could only have been accorded as

> a matter of grace and favor because it was not demandable as of right under the law and consequently has no such legal value as attaches to a hearing to which the law gives a right. * * * But such is not the construction put upon the statute as we have seen, by the Court of Appeals of this State, nor the practical construction as we infer from the averments of the pleadings, put upon it by the officers called to act under it, and if plaintiffs in error have the constitutional right to such a hearing for which they contend, the statute is properly to be construed so as to recognize and respect it and not to deny it. The Constitution and the statute will be construed together as one law."

Had the Supreme Court of Georgia passed upon this law and held that the tax-payer could not be heard by the assessors, a different question would be here presented, but it has not done so, and therefore this court is free to construe the law in accordance with the statement quoted above.

We respectfully submit that we have, therefore, in this case, the three essential elements to make "due process" as repeatedly held by this court, to wit, notice by the statute to all tax-payers of the time and place of the meeting of the assessors and a board of assessor competent and able to hear their complaint.

This court, beginning with

> The State Railroad Tax Cases, 92 U. S., page 575,

has repeatedly held this sufficient to comply with the "due-process" clause.

In that case the law was quite similar to the present law of Georgia, and, considering the question, this court, on page 609 of the opinion, said:

> "The statute requires the proper officers of the railroad companies to furnish to the State auditor a schedule of the various elements already mentioned

as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimate without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us, that for want of this notice the whole assessment of the property and levy of taxes is void.

"It is hard to believe that such a proposition can be seriously made. * * * The very moment you come to apply to the individual the right claimed by the corporation in this case its absurdity is apparent. Nor is there any hardship in the matter.

"This board (of tax equalization) has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

Following this, in the Kentucky Railroad Tax Cases, 115 U. S., page 321, a statute very similar to the Georgia statute was under consideration. This statute provided that returns should be made by all railroad companies to the auditor of public accounts, and that he should lay these returns before the State board of equalization. This board was required to meet on the first day of September in each year, and should the valuations or any of them, in the judgment of the board, be too high or too low, the board shall correct and equalize the same by proper increase or decrease thereof. It is then provided that the tax due shall be collected by suit against the railroad company. The Supreme Court held:

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes is not necessarily judicial and that due process of law as applied to that subject does not imply or require the right to such notice and hearing as are considered essential to the

> validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient. * * * The railroad company, by its president, or chief officer, is required by law at a specified time to return to the auditor of public accounts the property of the company. * * * This return made by the corporation, through its officers, is the statement of its own case and may be verified and fortified by such explanation and proof as it may see fit to insert. * * * It is laid by the auditor of public accounts before the board of railroad equalization and constitutes the matter upon which they are to act. They are required to meet on the first day of September of each year at the office of the auditor at the seat of government when these returns are submitted to them. * * * And in the performance of these duties their sessions are limited to a period of not longer than twenty days in any one year.
>
> "These meetings are public and not secret. The time and place for holding them are fixed by law. The proceedings of the board are made matters of record and authenticated by the signatures of the quorum present. Any one interested has the right to be present. * * *"

And again, in the case of Pittsburgh, Cincinnati, Chicago and Saint Louis Railway Co. *vs.* Backus, 154 U. S., pages 421-425, this court said:

> "It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the State board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice cannot be given at some time in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board and that is sufficient in tax

> proceedings; personal notice is unnecessary. It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board and that no notice was given of such valuation in time to take any steps for the correction of error thereon. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur in that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged vital."

And again, in the recent case of Bi-Metallic Inv. Co. *vs.* State Board of Equalization, 239 U. S., page 441, this court decided:

> "An order of the State board of equalization of Colorado increasing the valuation of all taxable property in the city of Denver forty per cent which was sustained by the Supreme Court of the State, held not to be in violation of the due process provision of the 14th amendment because no opportunity was given to the tax-payers or assessing officers of Denver to be heard before the order was made."

See also upon this question:

> Hagar *vs.* Reclamation District, 111 U. S., page 701.
> Glidden *vs.* Harrington, 189 U. S., page 259.
> Londoner *vs.* Denver, 201 U. S., page 385.
> Pullman Co. *vs.* Knott, 235 U. S., page 23.

Under this view of the case, we respectfully submit that the due-process clause is complied with by this law without reference to the arbitration proceeding which is so much referred to by counsel for plaintiffs in error. This arbitration proceeding, we submit, is nothing more than an appeal, which is not necessary to due process. And the State of

Georgia has the power to provide for the affirmation of the judgment of the lower tribunal through a failure of the appellate court to agree.

Lott *vs.* Pittman, 243 U. S., page 588.

We respectfully submit that the Supreme Court of Georgia has not erred in its ruling complained of, and that the judgment under review should stand affirmed.

Respectfully submitted,

R. A. DENNY,
Attorney General of Georgia.
GRAHAM WRIGHT,
Assistant Attorney General of Georgia.

TURNER ET AL., EXECUTORS OF MORTON, *v.* WADE, SHERIFF OF BROOKS COUNTY, GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 29. Argued November 14, 1919; restored to docket for reargument January 5, 1920; reargued October 11, 1920.—Decided November 8, 1920.

The Georgia Tax Equalization Act (Laws, 1913, p. 123, §§ 6-7), empowers the Board of County Tax Assessors to assess property for taxation and requires it to notify the taxpayer of changes made in his returns; it gives him, if dissatisfied, the right to demand an arbitration, and provides that a majority of three arbitrators, one appointed by him, one by the Board and the third by the two so selected, shall fix the assessment; but the arbitrators must render their decision within ten days from the naming of the arbitrator by the Board, otherwise the Board's decision—*i. e.*, its assessment—stands affirmed; and no notice is afforded the taxpayer before the making of the Board's assessment, nor any opportunity to be heard concerning it save that before the arbitrators. *Held*, that an assessment so made by the Board of County Tax Assessors, increasing the valuation returned by a property owner, without notice or hearing, was without due process of law, where his remedy by arbitration proved abortive because the arbitrators, though agreeing that the assessment was excessive, could no two of them unite on a new assessment before the ten day limitation expired. P. 70.

147 Georgia, 666, reversed.

THE case is stated in the opinion.

Mr. Arthur G. Powell, with whom *Mr. John D. Little*, *Mr. Marion Smith* and *Mr. Max F. Goldstein* were on the brief, for plaintiffs in error.

Mr. Graham Wright, Assistant Attorney General of the State of Georgia, with whom *Mr. R. A. Denny*, Attorney General, was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the constitutional validity under the due process clause of the Fourteenth Amendment of certain provisions of the Georgia Tax Equalization Act. Georgia Laws, 1913, p. 123.

The facts stated in the petition and amended petition are not disputed, and show that plaintiffs in error returned property for taxation at the value of $44,225. The County Board of Tax Assessors without hearing raised the assessment to $80,650. Notice was then given to the plaintiffs in error of the increase. Following the statute, plaintiffs in error demanded arbitration, and named an arbitrator, the Board selected an arbitrator, and the two selected a third. Upon meeting of the arbitrators all agreed that the value assessed by the Board was excessive. The arbitrator named by the plaintiffs in error fixed the valuation at $50,000. The arbitrator named by the Board fixed the valuation at $66,000. The third arbitrator fixed the valuation at $63,000. The arbitrators could not agree, each adhering to his own view. All the arbitrators believed the assessment too high, but for lack of agreement the arbitration failed, and after ten days from the date of naming of the arbitrator designated by the Board had expired, the statutory requirement that the valuation of the Board of Assessors should stand affirmed was followed, and the Collector demanded payment of the taxes on the sum of $80,650, the valuation fixed by the Assessors. The Tax Collector issued execution for the taxes upon this valuation, and plaintiffs in error filed a petition in equity to prevent the enforcement of the execution, setting up the constitutional objection to which we have referred.

The Superior Court of Georgia on interlocutory hearing granted an *ad interim* injunction. This action was reversed by the Supreme Court of Georgia. Upon a second

writ of error from the Supreme Court of Georgia the act was again held constitutional.

The assessment by the Board of Assessors was made under § 6 of the act, which provides that the Board of County Assessors shall meet each year within ten days of the date of the closing of the tax returns to receive and inspect the same. It is made the duty of the Board to examine the returns of both real and personal property, and if at any time, in the opinion of the Board, any taxpayer has omitted from his return any property which should be returned, or has failed to return property at its fair valuation, the Board is authorized to correct such returns and assess and fix the fair valuation upon the property. When the corrections, changes, and equalizations have been made by the Board, it is then its duty to give notice to any taxpayer of any changes made in his return, either personally or by leaving the same at his residence or place of business, or, in case of non-residents by mail. The section further provides that if the taxpayer is dissatisfied with the action of the Board, he may within ten days from the giving of said notice give notice to the Board that he demands an arbitration, giving at the same time the name of his arbitrator. Whereupon the Board shall name its arbitrator within three days thereafter and the two shall select a third, a majority of whom shall fix the assessment upon the property upon which the taxpayer shall pay taxes except so far as the same may be affected by the findings and orders of the State Tax Commissioner as in the act provided. Provision is made for qualification of arbitrators, and that they shall render their decision within ten days from the date of naming of the arbitrator by the Board of Assessors, otherwise the decision of the Board of Assessors shall stand and be binding in the premises. (The pertinent part of § 6 is given in the margin.[1])

[1] "Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each

In considering certain sections of the Georgia tax laws this court held in *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of a tax and the

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year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

"If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator: the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises."

amount thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case, with others, was cited with approval in *Londoner* v. *Denver*, 210 U. S. 373, 385, wherein we said that if the legislature of the State, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom, the tax shall be levied,—due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. (See 210 U. S. 385, and previous cases in this court cited on page 386.) See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 425.

As we have understood the argument of the Attorney General, it is admitted that the provision for arbitration, under the facts herein shown, does not of itself afford due process of law. But, it is now contended that § 7 saves the statute and provides for notice and hearing. Section 7 provides:

"That it shall be the duty of the County Board of Tax Assessors to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper returns for taxation.

"The said Board shall have authority to issue subpœnas for the attendance of witnesses and to require the production by any person of all his books, papers and documents which may throw any light upon the question of the existence or liability of property of any class for taxation. If any witness, so subpœnaed, shall fail or refuse to answer questions propounded or shall fail or refuse to produce any such books, papers or documents, such person shall be cited by said board to appear before the ordinary of the county," etc. (Punishment as for a contempt is provided.)

64. Opinion of the Court.

This case was twice before the Supreme Court of Georgia. In 146 Georgia, 600, the court held that when any change is made in the valuation of the property the taxpayer must be given notice of such change and, if dissatisfied, may demand an arbitration, and have a hearing before arbitrators as provided for in the act, and that such hearing gave due process of law. In 147 Georgia, 666, the previous decision was affirmed, and it was again held that, where any change is made in the valuation of the property of a taxpayer, he must be given notice of the change and, if dissatisfied, demand arbitration and a hearing before arbitrators as provided in the act, and the opinion refers to *Vestel* v. *Edwards*, 143 Georgia, 368, wherein it was said that § 6 of the act was attacked as violative of the due process of law clause of the Constitution for the reason, among others, that the act requires the arbitration to be made within ten days from the date of selection of the arbitrator by the Tax Assessors and without making allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of property and the ascertainment of its value, or for any other cause which might render the arbitration impossible within the time specified in the act. The court said that this part of the act was not obnoxious to the State or Federal Constitutions.

In *Vestel* v. *Edwards*, the court held that the appointment of a brother of one of the assessors as arbitrator disqualified him from acting as arbitrator, and in considering the statute we find no suggestion from the Georgia Supreme Court that a hearing was provided before the Board of Assessors. The court said that the provisions of a previous act (1910) read in connection with the statute of 1913, provided that the Ordinary might appoint the third arbitrator in event of inability to agree to such arbitrator by the two already selected. But this case presents no such situation. The arbitrators were agreed

upon. The arbitration failed because within the ten-day period fixed neither of the three arbitrators would recede from the valuation fixed by himself upon the property, and hence no majority award could be made. We are, therefore, unable to find in the decisions of the Supreme Court of Georgia that that court understood § 7 to provide for the notice and hearing required by due process of law. Therefore, looking to the sections of the statute for ourselves, we are forced to the conclusion that reading the provisions together, being parts of one and the same act, they clearly show that the Board of Assessors was not required to give any notice to the taxpayer, nor was opportunity given him to be heard as of right before the assessment was finally made against him. But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.

In the present case, as the facts already stated show, the taxpayer is subject to an assessment made without notice and hearing. In that situation we are clear that the case comes within the decision of this court in *Central of Georgia Ry. Co.* v. *Wright*, *supra*, and kindred cases, and not within that line of cases wherein the statute has fixed the time and place of hearing with opportunity to the taxpayer to appear and be heard upon the extent and validity of the assessment against him.

Entertaining this view, it follows that the assessment of the Board of Assessors ought to have been enjoined, because § 6 of the act, as construed and applied in this case, denies to the complaining taxpayer due process of law. It follows that the judgment of the Supreme Court of Georgia must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.